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JAMES H. McKENNEY,
Clerk

No. 215.

Brf. of Cahill & Wood for P. C.

Supreme Court of the United States.

Filed Oct. 12, 1901.

No. 215.—October Term, 1901.

E. Bement & Sons,
Plaintiff in Error,
vs.
The National Harrow Company,
Defendant in Error.

BRIEF OF THE PLAINTIFF IN ERROR ON MOTION TO DISMISS THE WRIT OF ERROR, ON THE GROUND THAT NO FEDERAL QUESTION IS INVOLVED.

CAHILL & WOOD,
Solicitors for Plaintiff in Error,
Lansing, Michigan.

FACTS.

At the outset we desire to correct one or two misstatements of fact in the brief of counsel for defendant in error.

1. Reference to the record at the places cited by counsel on page 2 of his brief, namely pages 389 to 392, as also the brief itself on page 3, paragraph 1 quoted from Record page 41, and paragraph 2 quoted from Record page 67, also paragraph 4 on page 4 of brief for counsel for defendant in error, shows conclusively that the excep-

tions which were stipulated out of the case were not all the exceptions which raised questions of law, but the exceptions "to the rulings by the referee in receiving or rejecting evidence." (Record page 390.)

2. In the last paragraph on page 4 of the brief of counsel for defendant in error, and again under III on page 7, it is urged that there are no facts pleaded or found which show that the questions involved in this record related to an article of interstate commerce. This particular allegation will be more fully considered farther on. At present it is sufficient to say that it is directly contradicted by the contracts themselves and by the undisputed testimony in the case. Dale vs. Hyatt, 125 U. S., 46–54, cited by counsel for defendant in error, is not in point for the reason that in that case no question of a conspiracy or combination in restraint of trade was in issue. It was simply a question of contract between two individuals.

3. The Court will decide for itself which of our assignments of error, if any, are applicable to this case.

4. The remaining allegations of fact will be better considered in their appropriate places in the argument.

ARGUMENT.

I.

Was the defendant (plaintiff in error) engaged in interstate commerce?

1. Plaintiff in error (the defendant in the Court below) was a Michigan corporation engaged in the manufacture of harrows in that State.

2. The complaint, by which the suit was commenced, alleges that the Michigan corporation was engaged in the sale of harrows in the State of New York and other States, (Record p. 4, old pp. 4 and 5,) and the whole purpose of the suit brought was to

restrain the Michigan corporation from selling harrows in the State of New York, beyond which any decree obtained could have no force. The defendant, then, was engaged in interstate commerce.

3. That the commerce restrained by these contracts is interstate appears from the contracts themselves.

Complainant's Ex. "A," R. P. 8.
Complainant's Ex. "A," par. first to seventh, R. pp. 8–10.
Complainant's Ex. "A," par. tenth, R. P. 10.
Complainant's Ex. "A," par. fifteenth, R. p. 11.
Complainant's Ex. "B," R. p. 14, paragraph 1.

4. It appears from the undisputed testimony.

R. p. 78, testimony of Emmet Coleman.
R. p. 81, testimony of Hiram Ellis.
R. p. 87, testimony of Willis E. Waite.
R. p. 183.
R. p. 282, sales to George H. Tyler.

The above citations show that plaintiff in error was actively engaged in interstate commerce and that this action was in consequence of and to restrain such commerce.

R. p. 247, old pages 385, 386, shows that plaintiff in error was engaged in interstate commerce with a large part of the United States during the time referred to.

5. That this conspiracy was in restraint of interstate commerce follows directly from the very nature of a patent. A patent covering the right to engage either in state or interstate commerce in the article protected by it, a monopoly of patents or a conspiracy to monopolize them must in the very nature of things, be a monopoly of or a conspiracy to monopolize interstate commerce in that article.

6. No testimony whatever appears in the Record to show either that these contracts were not in restraint of trade or that the commerce restrained was not interstate.

As a matter of fact this monopoly is one of the most vexatious in the country, as will clearly appear by an examination of the Record, and fully merits all that has been said of it by the Court in the cases hereafter cited. At the time this action was commenced it controlled practically the whole of the spring tooth harrow trade of the country. R. p. 125, old pages 195, 196.

7. The original license contract of the National Harrow Company of New York, to which the present company is successor, and which did not materially differ from the contracts in question, except that it extended the restriction for fifty years, was passed upon by the Court in the case of William Strait, et al. vs. The National Harrow Company, in the Supreme Court of Chemung County, and was there held to be in restraint of trade and void. (R. p. 572, Folios 716 and 717.)

On account of this decision complainant abandoned its New York organization and reorganized in New Jersey.

8. Complainant's contract, Exhibit "A," R. p. 9, Defendant's Exhibit 7, R. p. 83. was held void as in restraint of trade by the Appellate Division.

National Harrow Company vs. E. Bement & Sons, 21st App. Div. page 290.

9. Contracts identical with these exhibits, except the names of the parties and the style of harrow licensed, were held void as in restraint of trade in the following cases:

National Harrow Co. vs. Quick, 67 Fed. Rep. 130,

National Harrow Co. vs. Hench, et al. 76 Fed. Rep. 667,

Same case appealed C. C. A. 3rd Circuit, 27 C. C. A. 349, 83 Fed. 36.

National Harrow Co. vs. North-Molitor Mfg. Co., 89 Fed. 1019, 32 C. C. A. 610.

The last above was a memorandum decision dismissing an appeal from the decision of the Circuit Court for the Sixth Circuit and Eastern District of Michigan, dismissing the bill of complaint filed by the National Harrow Company against the North-Molitor Mfg. Co., substantially identical with the bill of complaint filed in this cause. The decision was not reported but was on the ground that the contracts were in restraint of trade.

II.

Was the Federal question raised in the Court below?

1. "Whenever the highest court of a State, by any form of decision, affirms or denies the validity of a judgment of an inferior court over which it by law can exercise appellate authority, the jurisdiction of this Court to review such decisions if it involve a federal question will, upon a proper proceeding, attach."

Williams v. Bruffy, 102 U. S. 248.

"No particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the Record that such rights were specially set up or claimed in the State Court in such manner as to bring it to the attention of the Court."

Green Bay & M. Canal Co. vs. Patten Paper Co. 172 U. S. 58.
Dewey vs. City of Des Moines, 173 U. S. 193.
Roby vs. Colehour, 146 U. S. 153.
C. B. & Q. Ry. Co. vs. Chicago, 166 U. S. 226.

Such an adverse decision may be made merely by denying the right to an appeal.

Gregory vs. McVeagh, 23 Wall. U. S. 294.

"When from the pleadings and record it is apparent that a State Supreme Court could not have reached the decision announced except by disposing of a federal question, the Supreme Court of the United States will review such question, although it was not put in issue by the pleadings nor directly passed upon in the opinion."

Kaukauna Water Power Co. vs. Green Bay & Canal Co., 142 U. S. 254.
Davis vs. Packard, 6 Pet. U. S. 41.

2. The federal question was raised before the referee by defendant's amended answer. R. p. 40, old page 64.

It will be noted that Exhibit 7 of defendant's amended answer, above referred to, is a duplicate of Exhibit A, attached to the bill of complaint.

3. The decision of the referee was in denial of the right.

Findings of Referee and 1st and 2nd Findings of Law, R. p. 67, old page 107.

4. The judgment of the Supreme Court was in denial of the right. R. p. 69, old page 109, 1st.

5. It was raised before the Appellate Division by the exceptions and appeal. R. p. 368, old page 575.

No complaint was ever made of the sufficiency of these exceptions.

6. The Appellate Division reversed the decision of the referee and determined in favor of the right that the contracts were void as in restraint of trade.

National Harrow Co. vs. E. Bement & Sons, 21 App. Div. N. Y. 290, R. p. 396 to 401, old pages 623 to 633.

7. It was stipulated that the federal question should be determined by the Court of Appeals.

R. p. 390, old page 612 first and second.

8. The decision of the Court of Appeals was in denial of the right for it affirmed the decision of the referee, thus sustaining the validity of the contracts and denying their violation of the Act of Congress in question.

National Harrow Co. vs. E. Bement & Sons,
R. p. 405, old page 645.

9. The federal question was again raised before the Court of Appeals by the motion for a re-hearing and was again denied. R. p. 409, old page 654.

In the face of the above we fail to see how the declaration on page 8 of the brief for defendant in error that "There is not one word in the Record which shows, or tends to show, that a federal question was decided either in the trial court or in the appellate division, or in the Court of Appeals," can be sustained.

10. We take no issue with the cases cited under paragraph IV, page 7 of the brief for defendant in error. They simply enunciate the well settled doctrine that if the record does not raise a federal question jurisdiction will not be retained and are therefore not in point upon the case at bar.

III.

Considering the brief for defendant in error as a whole, it seems to rest for its entire force upon the assumption that the question as to whether these contracts were or were not void as being in restraint of trade was a question of fact and not of law, and that for that reason the Court of Appeals refused to consider it. This assumption seems to us to be unsupported by the record for the following reasons.

1. As we have tried to show above, the referee found, as a matter of law, that the contracts were good and valid at law, and not in restraint of trade. The

Supreme Court rendered judgment to the same effect and therefore in direct denial of the right claimed by plaintiff in error. The Appellate Division held, as a matter of law, that the contracts were on their face void as being in restraint of trade. The Court of Appeals reversed this decision and affirmed the decision of the referee, and there is not a word in the opinion of the Court to indicate that it did not fully consider the question as to whether these contracts were in violation of the anti-trust law and decide as a matter of law that they were not. It is true that the main part of the opinion was given to the discussion of whether they would take up certain questions of fact, but it is also true that there is not a word in the opinion to indicate that one of the matters excluded in this way was the validity of these contracts under the anti-trust law. On the other hand, we believe a fair reading of the opinion will show that they did consider this question as a matter of law and decided against the right.

2. But, be that as it may, the invalidity of these contracts appears upon their face and by the undisputed testimony and the question is therefore purely one of law and not of fact and the Court of Appeals cannot, by merely saying that a question of law is one of fact, deprive this Court of jurisdiction.

Alexander vs. Machan, 147 U. S. 72.

IV.

The Court will not upon this motion go into the merits of the case any further than is necessary to determine the question of jurisdiction, and it will determine that upon the face of the pleadings and decrees.

The questions on this motion are:

1. Was the right to the protection of the Federal statute claimed? 2. Was the effect of the decision of the State Court in denial of that right?

As to whether such right was properly denied is a

question that goes to the merits of the case, and will be decided only after full hearing.

V.

The petition for the writ of error in this case averred all the facts neccessary to give this court jurisdiction. The writ was allowed by Mr. Justice Peckham after a full hearing from both sides. Neither at such hearing nor since has any fact contained in the petition been questioned.

EDWARD CAHILL and CLARK C. WOOD,
Solicitors for Plaintiff in Error.

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No. 215.

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Clerk

Brief of Cookinham for P. E.

Supreme Court of the United States.

No. 215.—October Term, 1901.

Filed Oct. 14, 1901.

E. Bement & Sons,
Plaintiff in Error,
vs.
The National Harrow Company,
Defendant in Action.

This is a motion to dismiss the writ of error on the ground that no federal question is involved.

The subject of litigation is Spring Tooth Harrows.

The suit is one in equity to enforce two alleged contracts set out in full in the complaint. The two contracts are the same in form but refer to a different style of harrow.

Record P. 3 to 21.

The defense is that the contracts are void as against public policy and in restraint of trade, and, also, that they are in violation of the Act of Congress known as "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," passed July 2d, 1890.

Record P. 23 to 58.

To show that the alleged contracts sued upon are void, defendant pleaded that, at the time of making the alleged contracts and as a part of the same transaction, other written contracts were made between the

parties to this litigation, and also with eighteen others. These several contracts are set out in full in the amended answer and are known as Exhibits 1, 2, 3, 4, 4½, 5, 6 and 7. Exhibit 7, attached to the answer being the same as the contract set out in the complaint. Some of these parties are corporations organized under the laws of the State of New York and others are corporations organized under the laws of other states. These parties carried on their manufacturing business at different points in the United States and marketed their products generally throughout the Union. The issues in the case were referred, and the case was tried before a referee who rendered his decision in favor of the plaintiff and against the defendant.

Record P. 59, also Record P. 62.

The referee found facts as follows: "I decide that the contract entered into in June, 1891, including the contracts 'A. and B.' between the National Harrow Company of New York and this defendant, were, and are, good and valid contracts, founded upon adequate considerations and were reasonable in their provisions: contracts 'A. and B.' imposed no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction to impose and accept."

Record P. 65.

He also found "That all of the contracts in evidence were, and are, valid and binding contracts such as might reasonably be made under the circumstances, founded upon an adequate consideration and that they embodied no illegal restraints and are not repugnant to any rule of public policy as in restraint of trade, or tending to create a monopoly, trust or other illegal combination, and that the contracts entered into be-

tween the defendant and the National Harrow Company of New York, including contracts A and B, are and were intended to be continuing contracts and should be enforced according to their true intent and meaning as hereby interpreted."

He then further found as conclusions of law that the plaintiff was entitled to judgment against the defendant.

2d. Decreeing that the contracts including contracts A and B are good and valid contracts in law.

3d. Decreeing specific performance, etc.

Record P. 67.

Judgement was entered upon this report and the defendant appealed to the Appellate Division of the Supreme Court, where the judgment was reversed and a new trial ordered.

Record P. 393.

From that judgment the plaintiff appealed to the court of appeals where the judgment of the Appellate Division was reversed and the judgment entered upon the report of the referee affirmed.

Record P. 406.

From this judgment a writ of error is taken to this court.

POINTS.

I.

It is most extraordinary that the counsel for the defendant in error can make the statement which he makes on page 2 of his motion papers "that the exceptions which raised questions of law in the case were by the act of the parties stipulated out of the case after the judgment had been entered upon the decision of the referee."

No stipulation affecting the rights of the parties in that regard has ever been made except one, which is found on page 389–390 of the Record, and I call attention to the stipulation for the purpose of showing the extraordinary character of the statement of counsel. It will be noted that the stipulation eliminates no law question from the case except that which relates to exceptions to the ruling of the referee upon the reception and rejection of evidence.

The argument of the learned counsel for the defendant in error is an attempt to show that there is no federal question before this court by reason of the peculiar provisions of the New York Statute, and the holding of the court of appeals of that state in this case.

My object in furnishing this brief in addition to the able argument of my associates is to show just what the situation of the case is with regard to the holding of the Court of Appeals. I am fully aware what the law is with reference to the decisions of the courts of the respective states, construing their own statutes, and I do not cross swords with counsel for the defendant upon that point. In this case, however, the

question is not the construction of the New York State Statutes, it is whether or not the court of appeals of the State of New York, has correctly construed the report of the referee and whether or not the facts found by the referee in connection with the contracts before the court are sufficient to raise a federal question.

The court of appeals misconstrued the report of the referee, in that it held that the referee had only decided that the contracts "A" and "B" attached to the complaint were valid contracts, utterly ignoring the fact that the referee had also decided that all the contracts in evidence were valid contracts. This is made apparent by reading the dissenting opinion of Judge Cullen where he states, in substance, that only the contracts "A" and "B" attached to the complaint were considered by the court. By referring to the portion of the referee's report above quoted it will be seen that the referee found that all of the contracts attached to the amended answer were valid contracts as all of these papers were in evidence before him.

I desire to call attention here to the fact that most of these contracts and all of the important ones were put in evidence by plaintiff.

Record P. 72.

All these important agreements are dated April 1st, 1891, but as a matter of fact were never executed until the 16th or 17th day of June, 1891. This is the explanation of the referee's reference to the papers as having been executed in June, 1891.

It is apparent again that the court of appeals misconstrued the portion of his report above quoted "that the contract entered into in June, 1891, including the

contracts "A" and "B," were valid contracts." It is certain then that there was before the court of appeals and there is before this court all the material contracts set out in the amended answer.

Let us see now just what the substance of these contracts is, calling attention particularly to Exhibits 5, 6 and 7. It is apparent that nineteen different manufacturers of spring tooth harrows had entered into an agreement to form a combination for the purpose of controlling the harrow trade; that they had agreed upon prices, and the contract provided that the combination should be effective when all the parties had signed the papers, or in case any of them did not sign on or before June 1st, then the papers were to become effective, provided the board of trustees of the company should resolve that the papers should be delivered.

Record P. 50, Fol. 80.

The contract, known as Exhibit 5 and called the Escrow Agreement, is one of the separate papers executed at the same time that the contracts A and B were executed and as a part of the same transaction, and the fulfilling of the conditions of this Escrow agreement were necessary in order to make the contracts A and B effective, for this contract provided as follows:

"But in case any of the above named persons, firms and corporations so neglect or refuse to sign, execute and deliver said respective contracts and licenses on or before the 1st day of June next, then, and in such case said E. Norris shall, provided he shall be so directed by a resolution duly adopted by the board of trustees of said National Harrow Company, make delivery of such of said contracts and licenses as have been signed

and executed, as above provided, at which time said *contracts and licenses shall become operative* and in case the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then, and in such case, the said Norris shall cancel each of said contracts and licenses and they shall be null and void."

In order to establish that the contracts ever became "operative" it was necessary for plaintiff to show that one of the two conditions of the Escrow agreement was fulfilled.

1st. That all the parties named in the Escrow agreement executed all the papers. Or

2nd. That the National Harrow Company, by resolution of the trustees decided to have the papers delivered, although all the parties named in the Escrow agreement had not executed them.

It was also necessary for the referee to find that one or the other of these facts existed in order to decide in favor of the plaintiff.

This the referee did, and in so doing it was necessary for him to find the making of the combination agreements between these ninteen parties to monopolize this branch of commerce and that commerce was necessarily interstate because it had reference to an article sold by these manufactures and each of them in many different states.

By the contracts "A" and "B" the price of harrows was arbitrarily fixed. These contracts provide that the price shall be different in different states. For instance, there shall be a maximum discount of 42 per

cent in New England States, the States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, and West Virginia, and a maximum discount of 45 per cent in all the other states. An illustration will show that the price is arbitrary. For instance, Springfield is in the State of Pennsylvania very near the Ohio line. Canneaut is in Ohio immediately opposite, there being simply an imaginary line between these two towns, yet the price of harrows in Pennsylvania is fixed at 42 per cent discount whereas in Ohio it is fixed at 45 per cent discount.

Every manufacturer produced a different style of harrow and the license contract itself provides that no one of the parties shall be permitted to make the style of harrow manufactured by any other. No two of these harrows could be produced at precisely the same expense, yet the selling price fixed was the same.

By a second illustration it is made clear that the contracts are in violation of the act of congress as being in restraint of interstate commerce.

The Eureka Mower Company, one of the contracting parties, was located at Utica, New York. Under the contracts it could sell harrows in Denver or California for less money than it could sell them in the city of Utica, where they were manufactured. And this solely because of the contract which had restrained them from selling their harrows in New York at a less sum where no freight was to be added, than at a point across the continent where the expense of transporting them would have to be added to the cost of the harrow in order to establish a fair selling price.

It would seem that there is no such thing as a contract in restraint of interstate commerce unless this

"contract," referring to all of the agreements in the case, which the referee found to be the "*contract*" is not one of that character.

The case of the United States against Addyston, Pike & Steel Co, 85, Federal Reporter 271, would seem to be an authority sustaining our position here.

II.

I do not wish to add anything to what is said by my associates upon the point that the contracts are void under the act of congress, except to call attention to the fact that the cases cited by my associates under their first point, were those brought by the defendant in error here upon these contracts, that is, upon the precise papers which are before the court in this case and that every time a federal court has passed upon them it has held that they were void. It would seem that the Court of Appeals has inadvertently misconstrued the report of the referee and has therefore arrived at an erroneous conclusion. That, in so doing, it necessarily held that the contracts were not in restraint of trade nor inimical to the act of Congress against trusts and monopolies.

III.

The motion should be denied and the plaintiff in error should be allowed to argue the case on its merits.

HENRY J. COOKINHAM,
Counsel for Plaintiff in Error,
Utica, N. Y.

No. 215.

By Cahill, Wood & Cookinham for P. C.

Supreme Court of the United States.

No. 215.—October Term, 1901.

Filed Mar 7, 1902.

E. Bement & Sons,
Plaintiff in Error,

vs.

The National Harrow Company,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

EDWARD CAHILL & CLARK C. WOOD,
Solicitors for Plaintiff in Error.

H. J. COOKINHAM,
Of Counsel.

LANSING
H. H. STALKER & COMPANY
1902

Supreme Court of the United States.

No. 215.—OCTOBER TERM, 1901.

E. Bement & Sons,
Plaintiff in Error,

vs.

The National Harrow Company,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

EDWARD CAHILL & CLARK C. WOOD,
Solicitors for Plaintiff in Error.

H. J. COOKINHAM,
Of Counsel.

STATEMENT OF THE CASE.

The facts in this case, so far as the federal question is concerned, are undisputed and are as follows:

In the year 1890 the interstate Spring Tooth Harrow business of the country was almost entirely conducted by about twenty companies.

Findings of Referee, R. p. 62;

Testimony of A. O. Bement, R. p. 183, old p. 288;

Testimony of Brinkerhoff, R. p. 114.

There had been some litigation over patents between these parties, and in September, 1890, a proposition was made to organize a combination of manufacturers nominally "for the mutual advantage of all engaged in the Float Spring Tooth Harrow business," but really to monopolize the trade in spring tooth harrows in the United States.

Testimony of A. O. Bement, R. p. 183;
Findings of Referee, R. p. 63.

The first step in carrying out this scheme was the contract, Defendant's Ex. 100, (R. p. 292, et seq.). This contract provided for the formation of a corporation to be known as the National Harrow Company To this corporation all those that entered it were to assign their patents and good will; "upon uniform terms and uniform conditions;" to receive the appointment of agents and licensees of the corporation; to agree to make no Float Spring Tooth Harrows except as such agents or licensees and to receive in compensation for their patents and good will, the value thereof "as agreed upon or fixed by arbitration in paid-up stock of the corporation."

Defendant's Ex. 100, R. p. 292, et seq.;
Testimony of C. H. Childs, R. pp. 128, 129.
Testimony of E. H. Risley, R. p. 154, o. p. 241.

In pursuance of this agreement, the National Harrow Company was organized in September, 1890, under the laws of the State of New York.

Findings of Referee, R. p. 63.

Within a short time thereafter, the National Harrow Company made, with the different firms and corporations composing it, a series of contracts and

agreements similar to those printed in the Record as Ex's. 1, 2, 3, 4 and 4½.

R. pp. 41-49;

Testimony of Leroy W. Stevens, R. p. 114.

Exhibit 1, provided that the parties to it should assign their entire float spring tooth harrow business, including patents and good will, to the National Harrow Company, and to receive in exchange for it paid-up stock of the corporation for the value of the stock of the business so transferred "to be agreed upon or settled by arbitration." They were also to receive a license authorizing

"The same firm and the same corporation to build and market the same style and construction of float spring tooth harrows which the person, firm or corporation was engaged in building and marketing just prior to the sale by him, them or it to the National Harrow Company and upon condition that such person, firm or corporation shall pay at uniform times, with all other agents, to the National Harrow Company one dollar on account of each and every float spring tooth harrow sold and delivered after September 1, 1890."

It was also agreed that in case the corporation should thereafter be dissolved, all the interests so assigned were to be re-transferred to the parties originally assigning them to the corporation. Each stockholder was to surrender his stock and any money remaining on hand was to be ratably divided between stockholders.

"The intent being that each interest shall stand after dissolution upon the same ground with reference to their respective interests as they did prior to the execution of this contract so far as the same can be carried out."

Ex. 1, R. pp. 42, 43, Par's 2 and 3.

Exhibit 3 (R. p. 47) provided for the arbitration referred to in Exhibit 1 and appointed the arbitrators.

Exhibit 2 (R. p. 45) was an assignment made as provided in Exhibits 1 and 3, by which the various firms and corporations conveyed to the National Harrow Company all their patents, good will and all their interests in the manufacture of spring tooth harrows and agreed not to engage in the spring tooth harrow business, directly or indirectly, except as a licensee of the National Harrow Company for a period of fifty years. In consideration of this assignment they were to receive as provided in Exhibit 1, paid-up stock of the National Harrow Company to the amount agreed upon by arbitration, under Exhibit 3 and a license to sell as agent of the National Harrow Company the same style of harrow they had been previously manufacturing.

Exhibit 4½ (R. p. 49 is the schedule of prices made necessary by the other exhibits referred to in order to make each licensee "subject to the same terms and conditions as every other agent and licensee." This contract not only provided the price at which the goods should be sold but also the discounts that might be allowed for sales in other states outside of those in which the manufacture was carried on, in other words, transactions of interstate commerce.

All of these exhibits, viz.: 1, 2, 3, and 4½ were signed by practically all the spring tooth harrow manufacturers in the country.

Testimony of A. O. Bement, R. pp. 183 and 184.
Findings of Referee, R. pp. 62 and 63.

Exhibit 4 (R. p. 48)is an escrow agreement by which the Clipper Chilled Plow Company placed its

agreements, Exhibits 1, 2 and 3 in the hands of Mr. Risley to be delivered under certain conditions, in the meantime agreeing to be bound by the schedule, Exhibit 4½. It does not clearly appear from the record whether a similar escrow to this was signed by all the other parties concerned, but it is immaterial since all the others actually became stockholders in the corporation and executed and delivered the assignments.

The Clipper Chilled Plow Company becoming dissatisfied brought suit against the National Harrow Company for the cancellation of the contracts. The court held that the contracts 1, 2 and 3 were in restraint of trade and decreed that they should be delivered up for cancellation.

Defendant's Ex. 134, R. pp. 362-367.
Strait v. Nat'l Harrow Co., 18 N. Y. Sup. 224.

These papers, except the assignments of patents, were subsequently destroyed and the contracts made with the different firms and corporations were canceled.

Testimony of A. O. Bement, R. pp. 226, 227;
Testimony of E. H. Risley, R. pp. 154, 155, 159;
Testimony of Leroy W. Stevens, R. p. 114.

Up to this time, although the National Harrow Company had been in existence from September, 1890, no stock had ever been issued and nothing had ever been paid upon it, there were in fact no stockholders or subscriptions for stock.

After, or at the time of, the cncellation of these contracts a new set of papers, substantially the same in their effect, except that they were made binding for the life of the patents instead of for fifty years, and did not include an assignment of the good will,

was made to take their place. These agreements are printed in the record as Ex's 1, 2, 3, 4 and 5; Ex. 1 being the same as Ex. A attached to the bill of complaint and printed in the Record, pp. 7-13; Ex. 2 being Ex. B attached to the bill of complaint and printed in the record, pp. 13-19; Ex. 3 is the same as Ex. 6 attached to the amended answer and is printed in the record on pp. 51, 52; Ex. 4 is the same as Ex. 5 of the amended answer and is printed in the record on p. 50. These contracts and agreements all bear date April 1, 1891, and when executed were to take effect as of that date, and really constitute one contract, but as a matter of fact were not all executed and delivered until about June 16 or 17, 1891.

Findings of Referee, R. pp. 63 and 65;
Testimony of Edwin H. Risley, R. p. 156;
Testimony of A. O. Bement, R. p. 227;
Testimony of Brinkerhoff, R. p. 327;
Testimony of Leroy W. Stevens, R. p. 114;
Defendant's Exs. 113, 114, 116, R. pp. 302-303.

The assignment, plaintiff's Exhibit 3, defendant's Exhibit 6 (R. p. 51 made at this time does not purport to be a new conveyance but

"Ratifies and confirms the assignment, sale and transfer of each and every patent and pending applications for patents heretofore made and executed by said second party to said first party."

Thus clearly referring back to, and linking the whole transaction with Exhibits 1, 2, 3 and 4½.

The delay in the delivery of the agreements was in consequence of the escrow agreement (Ex. 5, R. p. 50) by the conditions of which the contracts were not to be delivered or take effect until they had been signed by nineteen different persons, firms and corporations constituting substantially all the spring tooth harrow

manufacturers in the United States, except that it was also provided in the escrow agreement that if all the said parties should not sign before June 1, 1891, the National Harrow Company might, by a resolution of its board of directors, order its agreements, licenses, etc., to be delivered and they should then go into effect, or if the company should decide not to accept less than the whole number they should be canceled. This clearly indicates the purpose of the whole transaction.

"When Exs. 1, 2, 3, 4 and 5 had been signed by all those that did sign them, it constituted the manufacturers of all the spring tooth harrows in the United States at that time, except the Chilled Plow Company of Elmira and Blaker."

Testimony of Leroy W. Stevens, R. p. 115;
Testimony of Warren M. Brinkerhoff, R. p. 145;
Award of Arbitration, R. pp. 313-316.

In July, 1891, a new corporation was organized under the laws of New Jersey, by the same name as the old company and for substantially the same purpose. It will be noticed by reference to the articles of this new company that the capital stock was $500,000 divided into five thousand shares of $100 each. Fifty-three of the five thousand shares were subscribed, all of the subscribers being residents of New York instead of New Jersey.

Findings of Referee, R. p. 65;
Articles of Incorporation, R. pp. 156, 158.

To this company the National Harrow Company of New York by a written agreement made September 9, 1891, assigned all its rights and interests, except

$1,000 in cash, for a consideration of $455,000 of paid-up stock of defendant in error.

Plaintiff's Ex. 6, R. p. 73.

This stock was afterwards divided among the different parties forming the National Harrow Company of New York, and the said company then went out of business.

Concessions, R. p. 320, o. p. 501;

No consideration passed from the National Harrow Company to the plaintiff in error for any of these transfers except the stock already referred to being the consideration set forth in the agreements, the same that was given to all the persons, firms and corporations forming the National Harrow Company except as to the amount of stock given.

Testimony of A. O. Bement, R. pp. 227, 228.

Plaintiff in error lived up to the terms of the license contracts and paid royalty until August 1, 1893, since which time it has repudiated the contracts as being void and has refused to make reports or pay royalties thereunder.

R. pp. 76, 77.

It was admitted on the trial that there was not a spring tooth harrow manufacturer in the United States except the licensees of the National Harrow Company that had not been sued by it for infringement of patents.

Testimony of Warren M. Brinkerhoff, R. p. 147.

Neither the defendant in error not its predecessor, the National Harrow Company of New York, ever owned any manufactory or conducted a manufactur-

ing business, and with the exception of perhaps two hundred harrows which were manufactured for defendant in error in Kalamazoo, neither it nor its predecessor has ever engaged in the manufacturing business at all.

Testimony of Edwin H. Risley, R. p. 159.

And none of the parties organizing defendant in error were in the spring tooth harrow business.

Report of Referee, R. p. 65.

The methods employed by the company in the transaction of its business are clearly shown by Exhibits 102-112 (R. pp. 296-302), and will be more fully referred to hereafter.

The parties engaged in this conspiracy were engaged in interstate commerce. This clearly appears,

(a) From the contracts themselves.

Complainant's Ex. "A", R. p. 8;
Complainant's Ex. "A", Pars. 1 to 7, R. pp. 8-10;
Complainant's Ex. "A", Par. 10, R. p. 10;
Complainant's Ex. "A", 15th, R. p. 11.
Complainant's Ex. "B", R. p. 14, Par. 1.

(b) It also appears from the undisputed testimony.

R. p. 78, testimony of Emmet Coleman;
R. p. 81, testimony of Hiram Ellis;
R. p. 87, testimony of Willis E. Waite.
R. p. 183.
R. p. 282, sales to George H. Tyler.

The bill of complaint itself shows that it was filed for the express purpose of restraining plaintiff in error from engaging in interstate commerce in the

state of New York and for recovering damages for previous acts of interstate commerce

Complaint, R. p. 4, Pars. 8, (a), (c), (e) and (f).

October 10, 1894, the National Harrow Company, defendant in error, filed a complaint in the Supreme Court of Oneida county, New York, against the plaintiff in error praying for specific performance of contracts A. and B, plaintiff's Exhibits 1 and 2, and for damages for violations of said contracts by plaintiff in error.

Plaintiff in error appeared and answered and the action was referred to William A. Matteson of Utica, New York.

R. p. 2, o. p. 1.

Plaintiff in its amended answer to the complaint of defendant in error averred among other things "that said Exs. 1, 2, 3 and 4½ and also Exs. 5, 6 and 7 are in violation of and to that end defendant expressly pleads the act of Congress of the United States approved July 2, 1890, being chapter 647 of the first session of the fifty-first Congress entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.'"

R. p. 41, o. p. 64;

Amended form of answer, R. p. 382, o. p. 599.

It also averred "that the real object of said corporation was to form a trust and combination for the sole purpose of monopolizing the manufacture and trade in spring tooth harrows in the United States and that the said Exhibits 1, 2, 3, 4½, 5, 6 and 7 in effect did form a trust and combination and that the said National Harrow Company, plaintiff herein, is the result thereof and that it was in reality formed for

the sole purpose of effecting the absolute control of the manufacture and sale of spring tooth harrows in the United States and that said company has in fact substantially accomplished its object, which it alleges upon information and belief is unlawful on the ground that it is against public policy and in restraint of trade."

Amended answer, R. p. 382, o. p. 599;
Amended answer, R. p. 41, o. p. 65.

Exhibit 7 above referred to is substantially identical with Ex. A attached to the bill of complaint, plaintiff's Ex. 1, at page 7 of the record. Ex. 6 is plaintiff's Ex. 3 and Ex. 5 is plaintiff's Ex. 4. Plaintiff's Ex. 2 is substantially identical with plaintiff's Ex. 1 and Ex. 7 attached to the bill of complaint except in the territory to which it applies.

Testimony was taken and the case came on to be heard before the referee upon pleadings and proofs, and on June 5, 1895, the referee found among other things that all the contracts in evidence "were and are legal, valid and binding contracts such as might reasonably be made under the circumstances founded upon an adequate consideration and that they embody no illegal restraint and are not repugnant to any rule of public policy as in restraint of trade or tending to create a monopoly, trust or any other illegal combination."

Findings of Referee, R. p. 67, o. p. 107.

We desire at this point to call the court's attention to the fact that this finding covered "all of the contracts in evidence," thus including all of those offered by plaintiff in error as well as those offered by the National Harrow Company and conceding that all the

contracts stood on the same basis. The referee also found that all the contracts referred to were dated April 1, 1891, but were not to take effect until June, 1891, and combines them together as "the *contract* entered into in June, 1891, including the contracts "A" and "B".

Findings of Referee, R. p. 64, o. p. 102;
Findings of Referee, R. p. 65, o. p. 102.

The referee also found as a conclusion of law, "2nd. That the *contracts including contracts A and B* are good and valid contracts in law" (R. p. 67, o. p. 107), thus again including all the contracts under one classification.

June 11, 1895, a decree was entered in the Supreme Court of Oneida county in accordance with the findings above referred to, to the effect "that *all of the contracts in evidence* were and are legal, valid and binding contracts * * * * and that they embody no illegal restraint and are not repugnant to any rule of public policy as in restraint of trade and tending to create a monopoly, trust or any other illegal combination.

The case was appealed to the appellate division of the Supreme Court and it was stipulated that among the questions to be determined on the appeal was "*whether or not the contracts A and B are valid under the act of Congress approved July 2, 1890*, chapter 647 of the first session of the fifty-first Congress."

Stipulation, R. p. 390, o. p. 612.

The decision of the referee was reversed for errors of law (R. p. 392, o. p. 616), the court holding that the contracts were in law "*void as against public policy;*" that the provisions of the contracts "*not only*

stifle competition between the plaintiff's licensees but effectually prevent them from attempting to make any improvements in harrows" and that the contracts were void "as against public policy because by them it is sought to control for a long period of years, during the life of the patents, the prices of float spring tooth harrows."

Opinion of Appellate Division, R. pp. 396-401.

The order of reversal was afterwards amended to show that the judgment was "reversed on grounds other than those arising on the exceptions taken to the decision of the referee in receiving or rejecting appellant's evidence."

R. p. 404, o. p. 642.

Defendant in error appealed from the decision of the appellate division of the Supreme Court and June 19, 1900, the Court of Appeals handed down an opinion in the case in which it held that "we are unable to find in this record any errors of law upon which the appellate division could reverse the judgment." Accordingly the Court of Appeals reversed the judgment of the appellate division and affirmed that of the Supreme Court. The opinion of the Court of Appeals and the dissenting opinions of J. J. Cullen and Bartlett are printed in the supplement to this brief on pages 14 to 22 inclusive.

From this decision plaintiff in error appeals to this court and as the record had already been remitted to the Supreme Court a writ of error was issued from this court to the Supreme Court of Oneida county, that being the court in which the record was at the time the writ of error was issued.

The writ of error was allowed by Mr. Justice Peck-

ham after a hearing of counsel for both parties on the question of the jurisdiction of this court.

October 14, 1901, defendant in error moved to dismiss the writ of error on the ground that "the record in this case fails to disclose that any question was raised or decided in the Court of Appeals in the state of New York in whch any treaty of the United States or any laws of the United States or any constitutional provisions of the United States or any right granted or prohibited by any treaty of the United States or any law of the United States or any constitutional provision of the United States was involved." This motion is still pending.

PLAINTIFF IN ERROR'S ASSIGNMENTS OF ERROR.

The plaintiff in error in this case claims and intends to urge the following errors:

I.

The court erred in holding that the failure of the referee to give effect to the undisputed fact that contracts, Exhibits A and B of the bill of complaint, were illegal and void as in restraint of trade, was not an error of law.

I½.

The court erred in holding that the failure of the referee to give effect to the undisputed fact that contracts, Exhibits A and B, attached to the bill of complaint were in conflict with the act of congress, approved July 2, 1890, was not an error of law.

II.

The court erred in affirming the finding of the referee that "the contract entered into June, 1891, including the contracts A and B, between the National Harrow Company of New York and this defendant, were and are good and valid contracts founded on adequate consideration, and were reasonable in their provisions, contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept."

III.

The court erred in affirming the finding of the referee "that all of the contracts in evidence were and are legal and binding contracts such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints and are not repugnant to any rule of public policy and in restraint of trade, or tending to create a monopoly, trust or any other illegal combination."

IV.

The court erred in affirming the finding of the referee that plaintiff was entitled to judgment against the defendant,

* * * * * *

"Second. Decreeing that the contracts, including contracts A and B are good and valid contracts in law."

V.

The court erred in affirming the judgment rendered on the report of the referee in the Supreme Court for Oneida county in the said case.

"First. That the plaintiff is a legal and valid corporation, authorized to enforce its rights in courts having jurisdiction; and that all of the contracts in evidence were and are legal, valid and binding contracts, such as may reasonably be made under the circumstances, founded upon an adequate consideration and that they embody no illegal restraint and are not repugnant to any rule of public policy as in restraint of trade and tending to create a monopoly, trust or any other illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including contracts A and B attached to and made a part of the complaint in this action, are and were intended to be continuing contracts; and that the contracts, including contracts A and B before referred to, are good and valid contracts in law, and that the plaintiff has a good and valid title to said contracts."

VI.

The court erred in holding that the finding of the referee set forth in assignment of error No. 4 did not involve an error of law.

VII.

The court erred in holding that the finding of the referee set forth in assignment of error No. 5 did not involve an error of law.

VIII.

The court erer in holding that the finding of the

referee set forth in assignment of error No. 6 did not involve an error of law.

IX.

The court erred in holding that the judgment of the Supreme Court of Oneida county set forth in assignment of error No. 7 did not involve an error of law.

X.

The court erred in reversing the decision of the appellate division of the Supreme Court in the said cause that the said contracts were illegal and void as in restraint of trade.

XII.

The court erred in holding that, upon the facts found by the referee and on the face of the contracts themselves, they are not in violation of the act of Congress known as chapter 647 of the laws of 1890, and in not holding that the contracts are in violation of said act.

XIII.

The court erred in holding that, upon the facts found by the referee and on the face of the contracts themselves the conceded facts, and facts conclusively proved, the contracts are not in violation of the act of Congress known as chapter 647 of the laws of 1890, and in not holding that the contracts are in violation of said act.

Summing up these assignments of error, it is claimed on the part of plaintiff in error that the contracts in question in this action, to wit, plaintiff's

Exhibits 1, 2, 3, 4 and 5 must be construed together, and when so construed, constituted a contract or conspiracy in restraint of interstate commerce within the meaning of the act of Congress known as chapter 647 of the laws of 1890, and that the right so claimed under the federal statute was urged at the proper time and in the proper manner in each and all of the courts of the state of New York that had jurisdiction of the question, and that the highest court of the state of New York having jurisdiction of the question decided adversely to the right so claimed.

There is a clerical error in assignments of error Nos. VI, VII, VIII and IX, the Arabic numerals 4, 5, 6 and 7 in those assignments of error should read respectively, II, III, IV and V.

ARGUMENT.

The case presents two main questions for the consideration of the court.

1st. Is a federal question involved in this case of which this court can take jurisdiction?

2d. Are the contracts and agreements referred to void under the act of Congress in question?

IS A FEDERAL QUESTION INVOLVED IN THIS CASE OF WHICH THIS COURT CAN TAKE JURISDICTION ?

I.

A federal question was properly raised before the Supreme Court of Oneida county and its decision was in denial of a right claimed by plaintiff in error under a federal statute.

1. The federal question was raised before the referee by defendant's amended answer.

R. p. 40, o. p. 64.

It will be noted that Exhibit 7 of defendant's amended answer is a substantial duplicate of Exhibit A attached to the bill of complaint, and that Exhibits 5 and 6 attached to defendant's amended answer are the same as complainant's Exhibits 4 and 3 respectively, offered in evidence.

R. p. 381, o. p. 596.

R. p. 72, o. p. 114-115.

2. The referee found among other facts:

(a) That the entire spring tooth harrow business of the country was, prior to September, 1890, conducted by six firms and corporations. (R. p. 62).

(b) That these firms and corporations agreed to organize a corporation under the laws of New York to be known as the National Harrow Company. (R. p. 63).

(c) That the corporation was formed and that these six firms, with others including plaintiff in error, assigned to it their patents, license contracts and privileges under patents. (R. p. 63).

(d) That the licenses issued by this company to its licensees were declared illegal as in restraint of trade and were canceled by the parties thereto. (R. p. 63).

(e) That plaintiff in error in the fall of 1890 entered into the contract (defendant's Exhibits 1, 2, 3 and 4½, R. pp. 41-49), with the National Harrow Company of New York. (R. p. 63).

(f) That June 16th or 17th plaintiff in error and a number of other corporations entered into several

contracts with defendants in error, these contracts being plaintiff's Exhibits 1, 2, 3, 4 and 5 offered in evidence, in pages 72 and 73 of the record. (R. pp. 63 and 64).

(g) That among these contracts was an assignment, (plaintiff's Exhibit 3, defendant's Exhibit 6, R. p. 51), by which plaintiff in error assigned all its patents and pending applications for patents to the National Harrow Company of New York, agreeing to receive in payment therefor stock in the said National Harrow Company. (R. p. 64).

(h) That while these agreements were actually executed June 16th or 17th they were all dated April 1, 1891, and were intended to take effect as of that date.

This delay was in consequence of the escrow agreement, plaintiff's Exhibit 4, defendant's Exhibit 5, R. p. 50, by which it was provided that none of the contracts should take effect until executed by a sufficient number to control the trade of the country. (R. p. 64).

The referee thus found that all the contracts had been made at the time and in the manner claimed by plaintiff in error.

(i) Referee further found that none of the parties organizing the defendant in error were engaged in the harrow business at all. (R. p. 65).

(j) That the Nation al Harrow Company of New York assigned all its rights and interests to the defendant in error receiving therefor stock in the defendant in error and that said stock was transferred to plaintiff in error and the other licensees of the defendant in error in fulfillment of the agreements made between the said National Harrow Company of New York and said licensees. (R. p. 65).

Defendant's Exhibit 3, R. p. 47; defendant's Exhibit 6, R. p. 51.

3. In addition to these findings of fact by the referee, the undisputed testimony in the case showed, as appears from the references to the testimony in the statement of facts, that the corporation itself was organized, nominally, "for the mutual advantage of all engaged in the float spring tooth harrow business," but actually to control the manufacture and sale of spring tooth harrows throughout the United States; that neither the National Harrow Company of New York nor defendant in error had ever owned a manufactory or ever carried on the manufacturing of spring tooth harrows; that its whole purpose and aim had been to use the patents owned by defendant as a weapon against those selling or using spring tooth harrows who were not engaged in the conspiracy; that in pursuance of this scheme, it had sued for infringement of patents every spring tooth harrow manufacturer in the United States who had refused to join the conspiracy.

4. Such being the undisputed facts in the case, the question of the validity of of the contracts in question under the federal statute was simply a question of the construction of written instruments and was therefore purely a question of law and not of fact.

U. S. vs. King, 7 How. 833 at 847, 12 L. Ed. 831 at 845;

Houston & T. C. R. Co. vs. Texas, 177 U. S., 66;

The Edwin I Morrison, 153 U. S., 199 at 215;

U. S. vs. Pugh, 99 Mich., 265;

Sun Mut. Ins. Co. vs. Ocean Ins. Co., 107 U. S. 485.

5. Where the only question is a construction of one or more legal instruments the Supreme Court is not bound by the decisions of the state courts whether of law or fact.

Lane vs. Vick, 3 How. 464 at 476;
Watson vs. Tarpley, 18 How. 517;
Carpenter vs. Ins. Co. 16 Pet., 495 at 511;
Amis vs. Smith, 16 Pet., 303 at 312;
Liverpool & G. W. Steam Co. vs. Phenix Ins. Co. 129 U. S. 397;
Swift vs. Tyson, 16 Pet., 1;
Mitchell vs. Clark, 110 U. S. 633;
U. S. vs. Muscatine, 8 Wall. 575.

6. The referee found both as to the matters of fact and law that the contracts in question were valid and reasonable in their character and that a decree should be entered in favor of the complainant decreeing specific performance and injunction from further violation of the contracts and awarding damages in the sum of $20,985.

Findings of referee, R. pp. 62-68, o. pp. 98-109.

And he seems to have rested his findings sustaining the contracts on the ground of their reasonableness while conceding that they were in restraint of trade.

Findings of referee, R. pp. 65 and 67.

7. Judgment was entered in the Supreme Court of Oneida county in pursuance of these findings. of the referee, decreeing the validity of the contracts and awarding damages according to said findings.

8. It is immaterial that the referee in his findings

and the Supreme Court in its decree do not mention the federal question.

"Whenever the highest court of a state, by any form of decision, affirms or denies the validity of a judgment of an inferior court over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision if it involve a federal question will, upon a proper proceeding, attach."

Williams vs. Bruffy, 102 U. S. 248;
Woodruff vs. Mississippi, 162 U. S. 291;
Sayward vs. Denny, 158 U. S. 180;
Bridge Proprietor vs. Hoboken L. & I. Co., 1 Wallace 116;
C. B. & Q. Ry. Co. vs. Chicago, 116 U. S. 226 at 231;
Davis vs. Packard, 6 Pet. 41;
Davis vs. Packard, 7 Pet. 276;
Davis vs. Packard, 8 Pet. 310.

"No particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of the court."

Green Bay vs. M. Canal Co. vs. Patten Paper Co. 172 U. S. 58;
Dewey vs. City of Des Moines, 173 U. S. 193;
Roby vs. Colehour, 146 U. S. 153;
C. B. & Q. Ry. Co. vs. Chicago, 166 U. S. 226.

"Such an adverse decision may be made merely by denying the right to an appeal."

Gregory vs. McVeigh. 23 Wall. U. S. 294;
Stanley vs. Schwalby, 162 U. S. 255;

Bacon vs. Texas, 163 U. S. 207;
Lane vs. Wallace, 26 Law Ed. 703 (not in authorized Ed.).

"When from the pleadings and record it is apparent that a state Supreme Court could not have reached the decision announced except by disposing of a federal question, the Supreme Court of the United States will review such question, although it was not put in issue by the pleadings nor directly passed upon in the opinion."

Kaukauna Water Power Co. vs. Green Bay & Canal Co., 142 U. S. 254;
Davis vs. Packard, 6 Pet. U. S. 41.

9. The question having been clearly raised by the pleadings, the Supreme Court could not have sustained the validity of the contracts without deciding against the right claimed under the federal statute and a federal question was therefore presented and decided in the Supreme Court.

II.

The federal question was properly presented to and passed upon by the Appellate Division of the Supreme Court.

1. On appeal from the Supreme Court "the appellate division of the Supreme Court shall review all questions of fact and of law."

Code of Civil Procedure (N. Y.) Sec. 1022;
National Harrow Co. vs. E. Bement & Sons, 163 N. Y. 505, printed in the supplement to this brief.

2. The federal question was raised before the

appellate division by the exceptions and appeal (R. p. 368, o. p. 575), and no complaint was ever made that these exceptions were insufficient. It was further expressly stipulated that among the questions to be determined by the appellate division should be:

(1) The validity of contracts A and B attached to the complaint, and whether or not the contracts A and B are valid under the act of congress approved July 2, 1890, chapter 647 of the first session of the fifty-first Congress."

R. p. 390.

3. The appellate division did not mention the federal question but it reversed the decision of the referee and held as a matter of law that the contracts were void as in restraint of trade.

National Harrow Co. vs. E. Bement & Sons, 21 Appellate Division N. Y., 290;
R. pp. 396-401, o. pp. 623-633.

Thus deciding as a matter of law in favor of the right claimed by plaintiff in error under the United States Statute. Defendant in error appealed from this decision to the Court of Appeals, filing notice in due form that it intended

"To bring up for review upon such appeal, each and every part of said order of judgment, and the appellant hereby stipulates that upon affirmance, judgment absolute shall be rendered against it."

R. p. 403.

III.

The effect of the decision of the Court of Appeals, although it did not mention the federal statute, was in denial of the right of plaintiff in error under it.

1. The stipulation already referred to as to ques-

tions to be determined on the appeal (R. p. 390), also controlled the matters to be determined on the appeal to the Court of Appeals, thus definitely raising the the federal question in that court; besides, as has already been shown, it had been decided by the appellate division as a question of law and for that reason was before the Court of Appeals for consideration.

2. The order of reversal was amended so as to eliminate from the consideration of the Court of Appeals all questions arising out of rulings on receiving and rejecting testimony, thus leaving all other questions covered by the stipulation open for the consideration of the Court of Appeals. (R. p. 390).

3. The case came on to be heard in the Court of Appeals and an order was entered "that the judgment of the appellate division of the Supreme Court appealed from herein be, and the same hereby is reversed and judgment of special term affirmed with costs."

R. p. 1.

4. This decision finally disposed of the case as far as the courts of the state of New York were concerned and finally determined the validity of the contracts in question, as far as these courts were concerned, thus under the rulings already cited, being in direct denial of the right claimed by plaintiff in error under the federal statute. The court in its opinion (see supplement to this brief) held that it had no jurisdiction to review questions of fact; that as to those the decision of the appellate division was final; and that the appellate division, since it had not stated in its order of reversal that it reversed the case on the facts must be conclusively presumed to have reversed it on the law and therefore to have affirmed all the findings of fact of the referee. It further said, "We are unable

to find in this record any errors of law upon which the appellate division could reverse the judgment and as the form of the order requires us to assume that the reversal was had upon errors of law we must reverse the judgment. The judgment of the appellate division should be reversed and the judgment of the special term affirmed with costs."

National Harrow Company vs. E. Bement & Sons, 163 N. Y. 505;
supplement to this brief p. 14.

5. We claim that within the decisions of this court already cited, this decision of the Court of Appeals was a denial of plaintiff in error's right under the federal statute which may be reviewed in this court.

As we have tried to show, the decision of the Supreme Court being a question merely of the construction of whitten instruments and of undisputed testimony involved a question of law and was in denial of the right. The appellate division considered it as a question of law and as such reversed the decision and decided in favor of the right. The legal question was then carried to the Court of Appeals and the decision of the appellate division was reversed and the decision of the Supreme Court affirmed. This decision of the Court of Appeals affirming the validity of the contracts could not have been made without the decision of the federal question. This court, therefore, has jurisdiction to re-examine the case.

IV.

But it is urged on the part of defendant in error that the question of the validity of these contracts under the federal statute was, under the laws of New York, a question of fact, which the Court of Appeals

could not review; that, therefore, the Court of Appeals did not determine the federal question at all and that the writ of error should be dismissed for that reason.

In answer to this we say:

1. There is nothing in the opinion of the Court of Appeals to indicate that it did not fully consider and decide the federal question and there is nothing to show that it considered that question one of fact and not of law as it is held to be under the decisions already cited in this brief.

2. If it did hold the question to be one of fact, this court is not bound by its decision. The courts of the state of New York cannot deprive an appellant of his rights in this court by erroneously holding a question of law to be a question of fact. This is abundantly established by the cases already cited. And if it were not, to hold otherwise would be to put it in the power of any state court having exclusive jurisdiction of the facts to do as the referee did in this case and by calling a conclusion of law a finding of fact, deprive this court of jurisdiction.

While this court will not give judgement as to the facts in the case, yet, when the question "decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of federal law, the decision may be reviewed by this court."

Dower vs. Richards, 151 U. S. 658.

In Lytle vs. Arkansas (22 How. 193 at 203), in which the Supreme Court of Arkansas had decided against a presumptive right claimed under the laws of the United States it was held that "It is not material

whether the invalidity of the title was decreed in the Supreme Court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that court authorizes this court to re-examine the decree."

So that while the findings of fact in the case are final as to the elemental facts in the case, they are not so as to the conclusion drawn from these facts that the contract is valid, even though under the New York laws that was a question of fact.

3. But it must be conceded that there are some statements in the dissenting opinions in the Court of Appeals (supplement pp. 14-22) that would seem to indicate that the Court of Appeals did not consider the federal question at all but refused to consider it on the ground that it was a question of fact of which it had no jurisdiction. Conceding for the purpose of the argument that this is true, the question then arises as to its effect upon the rights of plaintiff in error.

It not only appears from the opinion of the Court of Appeals in this case that it had no jurisdiction to determine questions of fact and that the judgment of the appellate division was final as to all matters of fact, but it also appears that unless the order of reversal of the appellate division expressly stated that the reversal was upon the facts, it must be conclusively presumed to have been upon the law, and the necessary consequence of this presumption is that it must also be conclusively presumed that the appellate division affirmed the findings of the referee and the decision of the Supreme Court on all questions of fact, including the federal question, since in the view of the case we are now taking the federal question is treated as one of the questions of fact.

It follows from this that if the question of the validity of these contracts under the federal statute was one of fact under the laws of the state of New York, then the appellate division must be conclusively presumed in spite of its opinion to the contrary to have decided that the contracts were valid and thus to have in necessary effect denied the right claimed under the federal statute.

The judgment of the appellate division thus becomes "A final judgment or decree * * * in the highest court of a state in which a decision in the suit could be had," and such decision may be reviewed by this court.

U. S. Revised Statutes, Sec. 709;
Gregory vs. McVeigh, 23 Wall. 294, and cases cited on the question of the right to a review.

So that whether we consider that the Court of Appeals did actually pass upon the federal question or merely held that it had no jurisdiction to consider it, the necessary effect of its decision was a denial of the right of plaintiff in error and the question can be re-examined in this court.

Gregory vs. McVeigh, 23 Wall. U. S. 294.

THE SECOND QUESTION INVOLVED IN THE CASE IS, ARE THE CONTRACTS SUED UPON IN VIOLATION OF THE ACT OF CONGRESS APPROVED JULY 2, 1890, CHAPTER 647 OF THE FIRST SESSION OF THE FIFTY-FIRST CONGRESS, ENTITLED "AN ACT TO PROTECT TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES."

It is needless in this case to set forth the evil effects of a monopoly of the manufacture and sale of an

article so essential to every person engaged in agriculture as the spring tooth harrow. It is an absolute necessity to the farmer and if any combination can be formed which can legally control the entire trade in this article, it has the farmers of the country at its mercy.

But we believe it is proper that we should call the attention of the court to the means by which this monopoly effects its purpose. As we have already seen, and shall try to show more fully hereafter, it does not stop with a direct restraint of the manufacture and sale of the implements in question, but it enforces its monopoly by compelling its licensees to assign to it all their patents and then it uses the monopoly of patents thus attained as a club by means of which to enforce its monopoly of trade, and with this club it strikes not only at the manufacturer of the article and at interstate commerce in that article, but it also strikes at every farmer who buys one of the implements for use in his own field or who uses one there. It is true that this court cannot consider the effect of a monopoly on the manufacture and use of the article, but we believe that it is right to bring to the attention of the courth these effects as emphasizing the evils of restraint of trade of which it can take notice, viz., the restraint of interstate commerce in spring tooth harrows.

It clearly appears from the references already made on page —— to the record that this company has used this club placed in its hands by its monopoly of the spring tooth harrow patents, not only against the manufacturer and the user but against the dealer as well; that its methods have been vexatious and destructive of competition in the highest degree and that if it is permitted to continue, every user of a

spring tooth harrow in the United States must pay tribute to it and every dealer, even though exclusively engaged in interstate commerce, is at its mercy.

I.

Exhibits 1, 2, 3, 4, 5 and 6 offered R. pp. 72-73, which include contracts A and B on which suit is brought, were made in pursuance of a combination or conspiracy and must be construed together.

1. The referee found that in the early part of 1890 the spring tooth harrow business was conducted by about six parties and that there had been litigation between them over spring tooth harrow patents. It further appears by the undisputed testimony (R. p. 182-3) that these persons brought suit against E. Bement & Sons for infringement of patents, and failing to succeed in the case, an amicable agreement was proposed by which the market was to be controlled. In pursuance of this agreement a contract (defendant's Exhibit 100, R. p. 292) was prepared and submitted for signature to the harrow manufacturers of the country.

Testimony of A. O. Bement, R. p. 184;
Testimony of E. H. Risley, R. p. 154.

In this contract was found the germ of the National Harrow Company. It provided that a corporation should be formed under the laws of the state of New York, to be known as the National Harrow Company; that "those engaged in the float spring tooth harrow business" should transfer to it their patents and the entire good-will of their business, and should, in exchange, receive an appointment as a licensee of the National Harrow Company; that in addition to assigning the patents and good-will they were to give

a bond for the faithful performance of their agreements, among which agreements was one that they were not "to be thereafter interested in the manufacture or sale of float spring tooth harrows, except as agents and licensees of the National Harrow Company."

Defendant's Exhibit 100, par. second, R. p. 293.

The contract also provided that those entering into the combination should be licensed to manufacture and sell "the same styles of harrows subject to uniform conditions which they were manufacturing and selling just prior to the agreement," and no others; that differences were to be adjusted by arbitration and that (and this is very important),

"Fifth. In case it shall, at any time be deemed to the mutual advantage of the interests represented, to dissolve this corporation, and terminate all contracts and licenses, and nine directors of the corporation so vote by resolution, then and in that event, the corporation shall cancel all existing licenses and contracts, and shall execute and deliver to each person, firm or corporation a transfer of all of the interests which said person, firm or corporation transferred to the National Harrow Company, and release such interests from all further obligation under any existing contract or license the intent being to vest in each person, firm or corporation who becomes party hereto, all interests which they transferred to the National Harrow Company, and each stockholder shall surrender their stock to the corporation, execute and deliver a release of all claims, and any sum of money that may remain after the payment of the debts of the National Harrow Company shall be divided to the stockholders, according to the amount of stock which each interest holds, *pro rata*, and the corporation shall thereupon be wound up and its business discontinued, and no acknowledgment of the validity of any patent shall be of any force or effect thereafter, but each interest shall stand upon the same ground, with reference to

their respective interests, as they did prior to the execution of this contract."

Defendant's Exhibit 100, par. 5, R. p. 294.

The paragraph just quoted clearly shows that the assignments provided for in the original combination were never intended as *bona fide* sales, but were executed for the purpose of vesting the legal title in the Harrow Company in trust for the true owner, to whom the sole use was reserved.

E. Bement & Sons did not sign this agreement. The company was, however, organized as appears from the statement of facts already given in this brief and the license contracts provided for by Exhibit 100 were made. One of the parties to these contracts, afterwards brought suit against the National Harrow Company to have these contracts set aside, and it was found by the court among other things,

"Sixth. That under the contracts made with these manufacturers by the defendant, the defendant has fixed a uniform price at which certain styles of harrows must be sold, which price is in no way dependent upon the cost of manufacture."

"Seventh. That in the organization of this defendant corporation, and in the making of said contracts, the plaintiffs, together with the nineteen firms and corporations who have so contracted with the defendant, have formed a combination in pursuance of a conspiracy to engross and control the price at which harrows should be sold, and to prevent competition, which acts are injurious to trade and commerce and the public good."

R. pp. 363-364.

And it was further found as conclusions of law,

"First. That the contracts set forth in the first finding of fact being made for the purpose set forth in the seventh finding of fact, are illegal and void."

R. pp. 363-364.

The contracts above referred to are defendant's Exhibit 1 (R. p. 41), defendant's Exhibit 2 (R. p. 45), and defendant's Exhibit 3 (R. p. 47). A comparison of these agreements with plaintiff's Exhibits 1 (R. p. 7), 2, (R. p. 12), 3, (R. p. 51), 4, (R. p. 50), and 5, (R. p. 72), would show that while differing somewhat in their terms they embodied substantially the same restrictions, especially as regards the manufacture and sale of the articles as the contracts in question, except that they were to continue for fifty years.

The judgment in this case was dated February 17, 1891. May 27 a meeting of the board of directors of the National Harrow Company was held and it was then decided by them and the manufacturers to destroy all the papers similar to those which had been declared illegal. This was carried out and the papers were destroyed and new contracts, being those in question in this case, were executed. References to the testimony showing the above facts are fully cited in the statement of the case already given in this brief and the facts are entirely undisputed.

It thus appears that the contracts A and B in question are not isolated instruments but that they stand as the final consummation of the scheme formed and set forth in defendant's Exhibit 100 (R. p. 292), and a comparison of defendant's Exhibit 100, defendant's Exhibits 1, 2, 3, 4 and 4½, and plaintiff's Exhibits 1, 2, 3, 4 and 5 will show the identity of the scheme and that while purporting to be made as set forth in defendant's Exhibit 100 (R. p. 292), "for the mutual advantage of all engaged in the float spring tooth harrow business," it was clearly, from the beginning, a scheme to monopolize the entire spring tooth harrow business of the country and to retain it in the hands of those by whom it was at that time carried on.

2. From beginning to end of the various contracts no money consideration was ever planned to be paid. The consideration for the assignments which were to be made was to be stock in the National Harrow Company and nothing else, and nothing else was ever given.

3. Coming now to the consideration of the contracts in question, plaintiff's Exhibits 1, 2, 3, 4, 5 and 6 in detail.

The referee finds that all these contracts were made April 1, 1891, but that they did not take effect until June 16 or 17. A reference to Exhibit 4 of these Exhibits, being defendant's Exhibit 5, p. 50, will show the reason.

This is an escrow agreement, and after naming the parties to the contract, among whom is plaintiff in error, it avers that a certain contract and license has been executed by the National Harrow Company for each of these parties and to be signed by them and that these contracts

"Shall be held by said Norris, in escrow, for both parties until such time as all of said above-named persons, firms and corporations shall have signed, executed and delivered the same to said Norris. * * * But in case any of the above-named persons, firms and corporations shall neglect and refuse to sign, execute and deliver said respective contracts and licenses, on or before the first day of June next, then and in such case said E. Norris shall, provided he shall be so directed, by a resolution duly adopted by the board of trustees of said National Harrow Company make delivery of such of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall become operative and in case the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then and in such case the said Norris shall cancel each of

said contracts and licenses, and they shall be null and void."

R. p. 50.

It thus appears from the escrow agreement that none of these contracts were intended to take effect unless all the manufacturers of the country, or sufficiently near it to practically control the trade consented to the agreement. Thus showing clearly not only that all the instruments were to take effect as one and should be construed together but also that the assignments were not intended as a full, complete and final transfer, but were conditioned on the ability of the company to control the trade.

Exhibit 6 is the assignment itself, printed in the record on page 51. It does not purport to be a new conveyance but to "ratify and confirm" the previous conveyances (defendant's Exhibit 2, R. p. 45), thus joining these contracts to the original contracts which were declared illegal. The National Harrow Company at the same time, by this instrument, released its licensees from the obligations under previous licenses. It was also agreed that all disputed questions of value should be submitted to arbitrators and that the consideration for the assignment of patents by the licensees to the National Harrow Company was to be paid up stock in the National Harrow Company to such an amount as might be agreed upon. In pursuance of these agreements and of the agreement, plaintiff's Exhibit 5 (R. p. 72), also made at the same date and a part of the same transaction, by which plaintiff in error bound itself to pay the license fee of one dollar per harrow, the two contracts in question in this case, Exhibit A (R. p. 7) and Exhibit B (R. p. 13) were made. That these were also a part of the same transaction is shown,

First. By their date, being made at the same time.

Second. By their being included in the escrow agreement.

Third. By their exact conformity in every detail, not only to the escrow agreement and the assignment (Exhibits 3 and 4), but also in every thing except a few minor particulars, to the previous Exhibits, defendant's Exhibit 100 and defendant's Exhibits 1, 2, 3, 4 and 4½.

Fourth. By the fact that they are not limited to an ordinary license to manufacture under certain patents but have several provisions not found in an ordinary license contract. Among these are,

(a) The agreement to sell at a fixed price. (R. p. 9, Pars. second and third.)

(b) The right reserved to the National Harrow Company to reduce the prices. (Par. fourth.)

(c) The obligation (Par. sixth.) by which plaintiff in error bound itself not to make any other harrows "than those which it is licensed to manufacture and market under the terms of this license." The court will observe that there is no limitation in this paragraph of the restriction. It makes no difference whether the harrows are covered by the patents in question or not. It binds itself absolutely not to manufacture or sell, either directly or indirectly, any other harrows whether patented at all or not than those which it is licensed to manufacture by defendant in error, and not to change that construction in the slightest particular, however unimportant. The same restriction appears still more forcibly in paragraph ten, the right to manufacture being there limited to "duplicates of such samples as deposited by it with, and in the possession of the treasurer of the National Harrow Company."

The referee in his findings recognizes clearly that all these instruments constituted one contract and says,

"I decide that the *contract* entered into June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant, were and are good and valid contracts founded on adequate considerations and were reasonable in their provisions." (Findings of referee R. p. 65.) Thus holding that all these contracts, including A and B constitute one contract.

Plaintiff's Exhibit 6, R. p. 73, while not made until September 9, 1891, is clearly a part also of the same scheme. In view of the decision of the New York courts already referred to declaring the previous contracts illegal as in restraint of trade, it was deemed wise to abandon the New York company and organize under the laws of New Jersey. Accordingly, as appears from the statement of facts, a new company was formed in July, 1891, and incorporated in New Jersey by a number of people, none of whom were engaged in the harrow business. This company is the defendant in error. The National Harrow Company of New York, by this agreement of September 9th, assigned to it all its rights and interests of every kind exceptone thousand dollars in cash, for the sum of $455,000 in paid-up stock of defendant in error, which stock was afterward distributed to the stockholders in the New York company to take the place of the stock held by them in that company. No cash consideration, however, passed. Indeed, all the cash of the New York company, except the sum of $1,000, already referred to was turned over to defendant in error and the final result of the transaction was that the defendant in error is the New York company having the same stockholders, precisely, as the New York company, incorpo-

rated for the same purposes, holding the same property and transacting its business in the same way, the evident purpose of the reorganization being simply to escape the effect of the New York laws.

Findings of Referee, R. p. 65.

Def. Ex. 116, R. p. 303.

4. Nearly all these facts, as appears from the statement of the case, are within the findings of the referee, and those that are not are entirely undisputed. It seems to us that the inevitable conclusion from them is that these contracts were from beginning to end a part of one scheme and that all the contracts bearing date April 1, 1891, and the assignment of September 9, 1891, must be construed together as one contract. Certainly this is true if we omit the contract of September 9th. So far as the parol evidence is concerned, it is of course true as held by this court in Bailey vs. Hannibal & St. Joseph Railway Co., 17 Wall. 96, that "such evidence cannot be admitted in the case except for the purpose of connecting the several written instruments together and of showing that they are all parts of one transaction." But it is admissible for that purpose, although the truth of this claim is, as above shown, practically conceded by the findings of the referee. Even if it were not, the language employed by this court in the case just cited, continuing from the close of the quotation made above exactly applies to the case at bar:

"Nor is it admitted that the evidence is necessary in this case even for that purpose, as the instruments themselves contain the most persuasive evidence to establish that fact and inasmuch as it appears that they were all introduced either by the complainant or by the respodent, without objection, they are properly before the court. Such being the fact, it is

quite clear that they must all be regarded as instruments *in pari materia*, and that as such they are the proper subjects of consideration in order to ascertain and determine what is the true end of the transaction and the true construction of the contract between the parties. All of these writings were executed as a means to the same end."

This end we believe it clearly appears from an examination of the contracts was to monopolize the trade in spring tooth harrows throughout the United States. To the same effect as the above case and as holding that the several instruments should be construed together, see,

Joy vs. St. Louis, 138 U. S. 1;
Livingston vs. Story, 11 Pet. 386;
Rogers vs. N. Y. & C. Land Co., 134 N. Y. 210;
Hannig vs. Mueller, 82 Wis. 241;
Beckman vs. Beckman, 86 Wis. 659.

II.

Construed together these contracts constitute an agreement or conspiracy in restraint of trade.

1. They are contingent upon the joining of all the other parties in the combine (R. p. 50, o. p. 79), and if all or a sufficient number fail to join, the contracts were not to become operative.

R. p. 51, o. p. 80.

2. The so called sale of the patents was not a sale, but a mere transfer of the legal title in trust, the beneficial use remaining in the assignor in consideration of "paid-up capital stock of the National Harrow Company, to an amount equal to the value of such patents." If the Harrow Company went to pieces, as such trusts commonly do, and as seems to have been contemplated

this one would, the legal title was to be reconveyed to the real owners.

Plaintiff's Exhibit 3, R. p. 52.

3. The license, Exhibit A, R. p. 7, purported to grant the right of sale "throughout the United States" of the articles in question under all patented rights owned "or hereafter acquired" by the National Harrow Company. It undertook also to control the sale within the United States.

R. p. 8, o. p. 10.

4. The second paragraph of the license forbids them to sell anywhere on commission or to allow any rebates from the prices fixed.

Exhibit A, R. p. 9, o. p. 12.

5. The third paragraph restrains them from selling at a less price than schedule attached to the license. This was a direct fixing of prices by the combination.

Exhibit A, R. p. 9, o. p. 12.

6. The fourth paragraph puts the prices completely into the control of the combination by giving it the right "to decrease the selling prices, and to make the terms of payment and delivery more favorable to the purchasers."

R. p. 9, o. p. 12.

7. The sixth paragraph is not a license at all but is a direct restriction of trade, for by its terms defendant is prevented from making or selling *any other* "float spring tooth harrows or float spring tooth harrow frames without teeth, or attachments applicable thereto, *than those which it is licensed to manufacture*

and market under the terms of this license, except such as it may manufacture and furnish to another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee shall be licensed by the National Harrow Company to manufacture and sell except such other style and construction as it may be licensed to manufacture and sell by the National Harrow Company."

R. p. 10, o. p. 13.

This restriction is not merely against making, but also against selling, and applies not simply to the harrows covered by the patents but forbids *any change whatever, no matter how trifling, in the construction of the harrows sold by defendant, whether the harrows defendant desires to sell are covered by the patents or not.* No matter how small or immaterial the difference, it cannot sell them even in interstate commerce if they vary in the slightest degree from those covered by the license, unless they are the exact kind which another licensee is authorized to sell and the sale is made to such licensee. That this is the exact and definite intention of this clause is further shown by its practical repetition in paragraph ten (R. p. 10, o. pp.14-15) which states that nothing in the license "shall be construed to authorize or permit E. Bement & Sons to manufacture or vend directly or indirectly, any other or different style than duplicates of such samples as deposited by it with, and in the possession of the treasurer of the National Harrow Company and embraced in this license."

8. The license was personal and not assignable. (R. p. 11, o. p. 16, par. 15.) This would have been a proper restriction if it was an actual *bona fide* license under patents in good faith owned by defendant in error; but for that very reason it operates all the more

strongly in restraint of trade in the present case. The company having secured a monopoly of practically all the patents in the country, this clause operated to absolutely prevent any new dealer from entering the company or engaging in the business without the consent of those already in it.

9. Summing up Exhibit A, the whole intent and purpose of the contract was to prevent E. Bement & Sons from making or selling any other style of harrows, whether covered by the patents or not, than duplicates of the harrows they had been making previous to assigning their rights to the National Harrow Company or from selling those at any other price than that fixed by the National Harrow Company.

10. Exhibit B (R. pp. 13 et seq.) is practically identical with Exhibit A in all its restrictions, but with the additional restriction which is very important to this case that it only grants defendant in error the right of

"Manufacture at Lansing, Mich., and *sale in all the territory embraced within the United States, lying south and west of Virginia, West Virginia and Pennsylvania.*"

R. p. 14, o. p. 20.

This limitation upon the contract makes it inevitable that every transaction under it must be one of interstate commerce, since the goods must be manufactured in Michigan and not one of them can be sold in that state. The contract, Exhibit B, is, therefore, if a restraint of trade at all a direct restraint of interstate commerce.

11. Summing up all the written instruments involved in this case, with the undisputed parol testimony connecting them together as parts of one trans-

action, and considering with them the contracts in question it seems to us that the necessary conclusion is that the whole scheme and purpose for which the National Harrow Company was organized was to control the selling price of float spring tooth harrows throughout the United States. Defendant in error never engaged in the manufacture of harrows and there is not an atom of testimony in the case to show that it ever intended to do so. The whole scheme was vicious from its inception and was simply to enable the combination to set a price on float spring tooth harrows in the United States and to worry out of existence by pretended patent suits, any dealers venturing to oppose it.

In the words of Butler, District Judge, in the National Harrow Company vs. Hench, (C. C. A., 3d circuit) 27 C. C. A., 349, considering the same contracts, precisely, except that they were made with a different party:

"It is manifest, as well from the contract as from proofs outside of it, that the purpose of the parties was to form a combination between the various manufacturers of these harrows, to prevent competition in business and enhance prices; and such is the effect of their agreement. The corporation, provided to hold the legal title of the several patents, is merely an instrument to effect this object. The prior owners are still the beneficial owners, with right to continue their business, subject only to the restraint in its management imposed by the contract. The provision for licenses is made necessary by the transfers of title, and is simply another part of the scheme for combination and control of the business of the several patentees. The result would be the same in legal contemplation if the corporation and licenses had been dispensed with, and the contract had provided simply, as it does, for combination and restraint of competition. That such a contract would be unlawful

seems clear. * * * * Such combinations are conspiracies against the public interests, and abuses of patent privileges."

National Harrow Co. vs. Hench, 83 Fed. 36, 27 C. C. A. 349.

12. The referee in his findings concedes that the contract is in restraint of trade but supports it on the ground that the restraint is not illegal. He says:

"I decide that the contract entered into in June, 1891, including the contracts A and B, between the National Harrow Company of New York and this defendant were, and are, good and valid contracts founded on adequate considerations and *were reasonable in their provisions, contracts A and B imposing no restraint upon the defendant beyond those which the parties had a right from the nature of the transactions to impose and accept.*"

Findings of Referee, R. p. 65, o. p. 102.

And further on

"I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in courts having jurisdiction and that all of the contracts in evidence were and are legal, valid and binding contracts, *such as might reasonably be made* under the circumstances."

Findings of Referee, R. p. 67, o. p. 107.

13. But if there is a restraint of trade it makes no difference whether it is reasonable or not. The contracts, combinations, etc., in restrain of interstate trade or commerce which are declared to be illegal by the act of July 2, 1890, include all contracts, etc., operating to restrain trade or commerce whether legal or illegal at common law or whether the restraint is reasonable or unreasonable.

United States vs. Trans-Missouri Freight Association, 166 U. S. 290;

United States vs. Joint Traffic Association, 171 U. S. 505;

Addyston Pipe & Steel Co. vs. United States, 175 U. S. 211.

14. These contracts have repeatedly been before the courts and in every case, except the present have been held void as being in restraint of trade. The court passed upon the original contract inthe case of Strait vs. National Harrow Company (18 N. Y. Sup. 224, R. p. 365). In the decision in that case the court says of these contracts:

"In the organization of said defendant corporation, the plaintiffs, the National Harrow Company, and in the making of such contracts, together with the nineteen other firms and corporations who have so contracted with the defendant have formed a combination in pursuance of a conspiracy to engross and control the market for the sale of float spring tooth harrows and to control the price at which harrows shall be sold, and to prevent competition, which acts are injurious to trade and commerce and the public good."

R. p. 366.

The present contract exactly as involved in this case, except as to the parties with whom it was made, has also been passed upon by the federal courts.

In the National Harrow Company vs. Quick (C. C.) 67 Fed. Rep. 130. The court (Baker, J.) said:

"It seems to me that such a combination is illegal, and that its purposes are violative of sound public policy. The common law forbids the organization of such combinations composed of numerous corporations and firms. They are dangerous to the peace and good order of society, and they arrogate to themselves the exercise of powers destructive of the right of free competition in the markets of the country, and by their aggregate power and influence, imperil the free and pure administration of justice."

This case was carried to the Circuit Court of Appeals where the decision was affirmed although it was held in the case that these facts offered no defense to an action for an infringement of a patent.

National Harrow Company vs. Quick, 74 Fed. Rep. 236, (20 C. C. A. 410).

In National Harrow Company vs. Hench, et al, (C. C.) 76 Fed. Rep. 667, the court (Acheson, J.) says:

"Now it is quite evident to me, as well by the papers themselves as from the testimony of witnesses, that this scheme was devised for the purpose of regulating and enhancing prices for float spring tooth harrows, and controlling the manufacture thereof throughout the whole country, and that the combination, especially by force of the numbers engaged therein, tends to stifle all competition in an important branch of business. I am not aware that such a far-reaching combination as is here disclosed has ever been judicially sustained."

The above case was appealed to the Circuit Court of Appeals for the Third Circuit and the decision was affirmed. The language of the court which has already been printed in this brief (p. 45) being even stronger than that quoted above.

83 Fed. 36, (27 C. C. A. 349).

In National Harrow Company vs. Hench, 84 Fed. Rep. 226, the court (Coxe, J.) says of these contracts:

"The complainant was created solely to effectuate the purposes of the combination. The patent in suit being transferred as part of the unlawful scheme, can it be possible that, based upon such a title, the complainant can levy tribute upon the defendants and thus accomplish by indirection the very object of the monopoly more effectually than if the court had not declared the whole transaction void."

In the present case the appellate division (Follett

J.) after very fully considering all the facts regarding these contracts said of them:

"It seems to me that the provisions of the contracts authorizing in effect the plaintiff to fix the price at which harrows shall be sold during the existence of these patents, and providing that the defendant shall not directly or indirectly manufacture or sell any float spring tooth harrows or float spring tooth harrow frames without teeth or attachments applicable thereto other than those it is authorized to manufacture by the terms of the contracts are void as aginst public policy. No matter what improvements are made in float spring tooth harrows this defendant and all other licensees of the plaintiff are prohibited from adopting them and they are all confined to the manufacture and sale of float spring tooth harrows and covered by the eighty-five patents specified in the contracts. These provisions not only stifle competition between the plaintiff's licensees but effectually prevent them from attempting to make any improvements in harrows."

From this decision defendant in error appealed, as we have already seen, to the Court of Appeals and it was reversed, thus negativing the above conclusions reached by the appellate division.

But even in the Court of Appeals these contracts were not allowed to pass unchallenged. The dissenting opinion by Justice Cullen says:

"In my opinion the defendant conclusively proved by uncontroverted evidence that the two agreements declared by plaintiff were made in pursuance of the prior agreement referred to in the answer and the written instruments, construed together, show an illegal combination."

After citing some of the cases referred to above, he continues:

"In the views expressed in those cases I entirely concur."

Appendix to this brief, p. 15

It thus appears that every court before whom these contracts have come has held that they are a grossly oppressive restraint of trade, and in every case except the case at bar, has held them void for that reason.

15. The case of Addyston Pipe & Steel Co. vs. U. S., 175 U. S. 211, is very important in its bearing upon this class of contracts. In that case a large number of manufacturers of iron pipe entered into a combination or agreement in regard to the manufacture and sale of cast iron pipe, by which it was agreed that within certain territory only certain manufacturers should bid on contracts or that if any other of the manufacturers in the combination did bid they should do so at a higher price than the one to whom the contract should go under the terms of the agreement. The court held that this constituted an agreement in restraint of interstate commerce; that it was not necessary that the monopoly should be complete or that the prices charged should be unreasonable and says:

"While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect to articles manufactured by any of the parties to it to be transported beyond the state in which they were made."

The court distinguishes this case from the case of United States vs. E. C. Knight Co., 156 U. S. 1, and says:

"If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute."

And further on:

"It is the sale and delivery of a certain kind and quality of pipe, and not the manufacture, which is the material portion of the contract, and a sale for delivery beyond the state makes the transaction a part of interstate commerce."

And again:

"The commodity may not have commenced its journey, and so may still be completely within the jurisdiction of the state for purposes of state taxation, and yet at that same time the commodity may have been sold for delivery in another state. Any combination among dealers in that kind of commodity, which in its direct and immediate effect forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another state, would, in our opinion, be one in restraint of trade or commerce among the states."

The whole case is very instructive and when taken in connection with the other authorities cited and the various contracts and facts as presented by the undisputed testimony, we think justifies the conclusion that these contracts are also not only in restraint of trade but of interstate commerce.

III.

Was the trade or commerce restrained by these contracts interstate?

We contend that there can be no question as to this for the following reasons:

1. The bill of complaint was filed to restrain acts of interstate commerce.

It avers "That the defendant is a corporation duly

organized and doing business at the city of Lansing, Mich."

Complaint, R. p. 3, o. p. 3.

It alleges as violation of the contracts in question that plaintiff in error has

"Sold and delivered harrows, harrow frames and attachments applicable thereto, and delivered the same to the parties purchasing the same, to wit, to J. H. Wilhelm, Myerstown, Pa., to be sold on commission; and has, in violation of the terms of said license, allowed rebates or discounts not authorized by the terms of said license, to J. H. Wilhelm of Myerstown, Pa., and to Coleman & Horton, of Nichols, Tioga county, N. Y."

Both these transactions were clearly acts of interstate commerce, the goods being manufactured in Michigan, and sold by plaintiff in error in Pennsylvania and New York.

2. The contract, Exhibit A, attached to the bill of complaint, by its express terms, relates to interstate commerce, viz., to the right

"To use in its business in the manufacture at Lansing and sale throughout the United States of float spring tooth harrows, harrow frames without teeth and attachments applicable thereto," the patents in question.

The sales controlled by the license agreement are thus all the sales made by plaintiff in error in the United States whether interstate or not.

Ex. A, R. p. 8.

3. That the commerce restrained was interstate also follows as a necessary consequence from paragraphs first to seventh, inclusive, of Exhibit A. These paragraphs contain various restrictions and none of them have any limitation which would restrict their application to the local trade.

Ex. A, Pars. 1 to 7, R. pp. 8-10, o. pp. 11-13.

4. The sixth paragraph of the bill restrains them from selling any different float spring tooth harrows than those they are licensed to manufacture, no matter whether the harrows they desire to sell are patented at all or not and it applies as fully to interstate trade as to local. The same thing is true of paragraph ten.

Ex. A, Pars. 7 and 10, R. p. 10. o. pp. 13 and 14.

5. Paragraph fifteenth makes it impossible for them to transfer their rights even with all these restrictions to other parties. This has already been commented on.

Plaintiff's Ex. A, Par. 15th, R. p. 11, o. p. 16.

6. Plaintiff's Exhibit B is by its very terms expressly limited to acts of interstate commerce and nothing else, since the rights granted under it are

"The manufacture at Lansing, Mich., and sale in all the territory embraced within the United States, lying south and west of Virginia, West Virginia and Pennsylvania."

This contract thus restrains plaintiff in error from selling at all in any part of the United States outside of the boundaries fixed by the contract. It also applies restraints which are substantially identical with those of Exhibit A to all sales that the plaintiff in error is authorized to make within that territory.

7. Schedule B attached to Exhibit A not only fixes the price and terms of sale but directly restrains interstate commerce. It provides that

"A maximum discount of forty-two (42) per cent, may be allowed on sales of harrows, frames and teeth in the following territory: All of the New England states; also states of New York, Pennsylvania,

New Jersey, Deleware, Maryland, Virginia and West Virginia.

"A maximum discount of forty-five (45) per cent may be allowed on all sales made in the territory throughout the United States not mentioned above."

Ex A, R. p. 12, o. p. 18.

Under this provision, for instance, a harrow must be sold at one price in Springfield, Pa., and at another price in Conneaut, Ohio, directly opposite.

8. The undisputed testimony shows that the sales desired to be restrained were acts of interstate commerce by defendant in error.

Testimony of Emmet Coleman, R. p. 78;
Testimony of Hiram Ellis, R. p. 81;
Testimony of Willis E. Waite, R. p. 87.

All these witnesses were introduced by defendant in error for the purpose of maintaining its case.

Arthur O. Bement, on *cross-examination* directly testified that plaintiff in error was largely engaged in interstate commerce.

R. p. 247, o. pp. 385-6.

The same conclusion follows from the sales to George H. Tyler, (R. p. 282, o. pp. 441-443) also from the testimony as to the different firms and corporations engaged in the manufacturing and selling of float spring tooth harrows in the United States.

Testimony of A. O. Bement, R. p. 183, o. pp. 287-289.

9. The referee in his findings made no distinction between sales of interstate commerce and other sales and awarded damages for all sales in violation of either Exhibit A or Exhibit B.

Findings of Referee, R. pp. 66 and 67, o. pp. 105-106.

IV.

The United States patent laws afford no protection to this monopoly.

It is contended that contracts A and B are simply licenses under patents owned by the National Harrow Company and are therefore, entirely within its authority as owner of the patents under the monopoly granted by the patent laws. This is not true for the following reasons:

1. The contracts are not simply licenses under patents. Both contracts A and B, as has already been shown, go far beyond the legitimate scope of a license contract.

(a) Patents are granted not to stifle but to encourage invention. Paragraphs six and ten of both Exhibits A and B not only do not permit but stifle invention, for they forbid the licensee to make any improvements.

(b) The same paragraphs are a direct restraint of trade, entirely outside the scope of any proper license contracts for they forbid the sale by the licensee of any other harrow whether patented or not, or even any other part of a harrow.

(c) Paragraph eight goes still further and binds them not to

"Alter or change the construction of the float spring tooth harrows, float spring tooth harrow frames without teeth or attachments applied thereto, which it is authorized to manufacture and sell under this license in any part or portions thereof which embody any of said inventions covered by said letters patent or any of them, or any re-issues thereof."

This restriction does not stop with the patented features but they are not to alter in any manner, however immaterial the elements embodied in the claims of the patent.

(d) The same thing is true of paragraph nine, in which the National Harrow Company agrees that it will not license any one else to manufacture harrows "of the peculiar style and construction" of the harrow deposited with them by the plaintiff in error.

(e) By the eleventh paragraph any departure from the terms of the license, however slight, authorizes the National Harrow Company to treat the licensee as an infringer. This provision is altogether outside the scope of an ordinary license contract since it is a well settled rule that a failure to pay royalties does not authorize the licensor to treat the licensee as an infringer.

2 Robinson on Patents, Sec. 821.

(f) The complete control over prices reserved to the licensor, while possibly not entirely inconsistent with a *bona fide* license contract, goes very far to support our contention that this is nothing of the kind.

2. A patent is a species of property the same as anything else, and being such, there may be a monopoly of patents just as well as there may be a monopoly of horses, or of wheat, corn or coal. It is, of course, true that a man has a right to purchase and to hold in his own right all the patents in force relating to spring tooth harrows, and having done so, he may control them as absolutely as the original patentee. But he occupies the same position towards every other species of property. He may, with equal right, buy all the wheat or iron or coal or horses or land or other property in the country, fixing his own price on it and

the rest of the world must take it at that price or let it alone, always provided his title be not tainted by unlawful acts or designs which will defeat it altogether.

But this is far from saying that the courts will aid him to acquire the title simply for the purpose of dictating the prices, still less that he can conspire with others to do so.

The same thing is true of a monopoly of patents.

"Patents confer a monopoly as respects the property covered by them, but they confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade. Patented property does not differ in this respect from any other. The fact that one patentee may possess himself of several patents, and thus increase his monopoly, affords no support for an argument in favor of a combination by several distinct owners of such property to restrain manufacture, control sales and enhance prices. Such combinations are conspiracies against the public interests, and abuses of patent privileges. * * * * Patentees may compose their differences, as the owners of other property may, but they cannot make the occasion an excuse or cloak for the creation of monopolies to the public disadvantage."

National Harrow Company vs. Hench, 83 Fed. 36, 27 C. C. A. 349 at 351.

3. A monopoly of patents, must, in the very nature of things, be in violation of the federal anti-trust law.

A patent controls not only the manufacture and use, neither of which will bring it within reach of the law, but it also controls the purchase and sale, and by its agency the members of the combination have it within their power to forbid any interstate commerce of any kind in the articles covered by the patents.

4. By reason of this very fact a monopoly of patents

is as much more vicious and vexatious in its results upon a community as the powers given under the patent laws exceed those derived from the mere ownership of ordinary property. By means of the weapon thus placed in their hands, the members of the combination have at their mercy, if the combination be sustained, not only the manufacturer and the dealer engaged in interstate commerce in the articles in question, but every retail dealer,—more than that, every purchaser and every one who uses a spring tooth harrow in the field, for the patent laws forbid under equal penalties, manufacture, sale and use.

And we submit that the undisputed testimony in the case and the necessary conclusion from the contracts themselves, is that the sole purpose for which the National Harrow Company was organized was to enable it to avail itself in the fullest degree of this weapon.

V.

Plaintiff in error, therefore, contends:

1. That there is a federal question properly raised in this case over which this court has jurisdiction.

2. That the contracts in question constitute in connection with the other contracts made at the same time and a part of the same transaction, a "contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several states" within the meaning of chapter 647 of the acts of the fifty-first Congress, "being an act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890.

3. That being contracts in violation of a positive statute, they will not be enforced by a court of equity

and that a decree should be entered dismissing the complaint.

EDWARD CAHILL,
CLARK C. WOOD,
Solicitors for Plaintiff in Error.

Appendix.

OPINION OF COURT OF APPEALS.

NATIONAL HARROW COMPANY,

V.

E. BEMENT & SONS.

PARKER, C. J. The printed "case" is not without indications that the learned justice who wrote for the appellate division intended a reversal upon the facts, but through inadvertence of the court in making or counsel in preparing the order of reversal, it does not show that the reversal was upon the facts, and hence this court is required by statute to presume that the judgment was not reversed upon a question of fact, but upon the law. Code § 1338. That section is in substantially the same form now as when the Code of Civil Procedure was enacted in 1876. The amendment of 1895, to which reference will be made later, in no wise affected an order which did not state that the reversal was upon the facts. In very many cases the court has been invited to review judgments where it was apparent that a mistake had been made in the order of reversal, but it has steadfastly adhered to the command of the statute, and refused to sustain the judgment unless it appeared that there was an er-

ror of law upon which the general term or the appellate division, as the case might be, could have rested its reversal. Among these cases may be found the following: Weyer v. Beach, 79 N. Y. 409; Davis v. Leopold, 87 N. Y. 620; Hannigan v. Allen, 127 N. Y. 639, 27 N. E. 402; Furner v. Seabury, 135 N. Y. 50, 31 N. E. 1004; Mack v. Colleran, 136 N. Y. 617, 32 N. E. 604; Riendeau v. Bullock, 147 N. Y. 269, 41 N. E. 561; Bomeisler v. Forster, 154 N. Y. 229, 48 N. E. 534, 39 L. R. A. 240; Snyder v. Seaman, 157 N. Y. 449, 52 N. E. 658; Petrie v. Trustees, etc., 158 N. Y. 458, 53 N. E. 216; People v. Adirondack Ry. Co., 160 N. Y. 225, 54 N. E. 689; Gannon v. McGuire, 160 N. Y. 476, 55 N. E. 7; Lannon v. Lynch, 160 N. Y. 483, 55 N. E. 5; Spellman v. Looschen, 162 N. Y. 268, 56 N. E. 741; Shotwell v. Dixon 163 N. Y. 43, 57 N. E. 178. Everyone of the cases cited is consistent with the requirement of the statute, and not only holds that the statute limits the court in such a situation to the review of questions of law presented by exceptions, but the various questions of law which may be passed upon on such a review have been considered, and it has been decided that they are confined to rulings touching the admission and rejection of testimony, to the question whether the conclusion of law is supported by the facts found, and also whether any material finding of fact is without evidence to support it. Not only has the court in all the cases I have referred to failed to discover any other question of law than those just mentioned, but this court has said again and again, and very recently, as I shall soon point out, that there are no other questions of law which can arise in such a situation as this record presents. Before

referring to the special discussion of this subject in the recent decisions of this court, attention is invited to the fact that section 1338 as originally enacted had one more sentence than at present. The section formerly read as follows: "Sec. 1338. Upon an appeal to the court of appeals from a judgment, reversing a judgment entered upon a referee's report, on a decision of the court, upon a trial without a jury; or from an order granting a new trial upon such a reversal; it must be presumed, that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears, in the body of the judgment or order appealed from. In that case, the court of appeals must review the determination of the general term of the court below, upon the questions of fact, as well as the questions of law." Formerly, therefore, it was the duty of this court, where there was a reversal upon the facts, to review the questions of fact as well as the questions of law; but after the adoption of the new constitution, which took effect January 1, 1895, and which provided that the jurisdiction of this court, "except where the judgment is of death, shall be limited to the review of questions of law," the legislature of that year, for the purpose of conforming the practice to the mandate of the constitution, amended section 1338 by striking out the last sentence. When that was done, the last vestage of the right of this court to review the facts of a trial had before a court or referee, whatever the form of the order of reversal, was swept away. The authorities down to that time consistently held that the facts should not be reviewed save when the reversal was in terms upon the facts, as an examination of the

cases cited above will show; and when that right was taken away by repeal of the provision authorizing such review, it would seem that the constitution and the statute together had securely barred our entrance to the record for the purpose of examining the evidence and determining what judgment such evidence calls for, and deciding the appeal accordingly. The learned counsel now proposes that we shall do just that, and nothing more. The proposition is presented differently, of course, and far more seductively, but reflection shows that the result aimed at is not and cannot be less than that. If, in the absence of decision, there were room for argument as to whether the effect of the repeal of the provision of section 1338 authorizing this court to review the facts where there is a reversal upon the facts was to invest the court with a power which it did not have at the time of such repeal, namely, the power to review the facts where the reversal was not upon the facts, it cannot be listened to now, for that question has been otherwise decided, and therefore is no longer an open one.

The court has had before it since the amendment of 1895 a number of cases where the extent of the power of review in this court where the reversal of a referee or trial court is not upon the facts has been considered. In Bomeisler v. Forster, supra, the court, speaking through Judge Gray, and after calling attention to the fact that the exception to the decision made it the duty of the appellate division to review all questions of fact and law, stated the rule as to the effect of an order of reversal which is silent as to its grounds to be that this court is bound to presume that the reversal was upon ques-

tions of law. The opinion then proceeds to state the limit of our authority in such a case in the following words: "Our review is, therefore, confined to the consideration of whether, upon the decision made by the trial court upon the facts, the legal conclusion followed that the plaintiff was entitled to the equitable relief awarded him, and, if there was no error in that respect, whether there were errors of laws committed in the rulings upon the trial, which would in any event, have justified a reversal of the judgment, and rendered a new trial necessary." In that decision the facts were not separately stated, but it was what is known as a "short decision," and the court considered the effect of its substitution for separate findings of fact, and reached the conclusion that such a decision has in its support the presumption that all the facts warranted by the evidence and necessary to support the judgment were impliedly found. In support of that proposition the court cited the case of Trustees of Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876. The case of Petrie v. Trustees, etc., supra, was a case where the referee's report was also general in form, and the court followed the decision in the Bomeisler and Amherst College Cases in holding that all the facts warranted by the evidence and necessary to support a judgment in such a case were impliedly found by the referee, and it adopted the rule of the Bomeisler Case as to the boundaries of the right of review in this court where the order of reversal does not state that it is upon the facts. The form of the decision was the same in the People v. Adirondack Ry. Co., supra, and this court, following the cases already referred to, Judge Vann writing, said: "It must be presumed that all the

facts warranted by the evidence and necessary to support the judgment were found by the special term and that the reversal by the appellate division was based wholly upon errors of law, the facts standing approved by that court." This case was cited in Gannon v. McGuire, supra, in support of the proposition, in which all of the court agreed, that, "according to the order of reversal, the learned appellate division did not disturb the facts presumed to have been found by the trial court, which include all facts warranted by the evidence and necessary to support the judgment." And Judge O'Brien, in Lannon v. Lynch, supra, after referring to the requirement of section 1338 of the Code in a case where it does not appear in the order appealed from that the judgment was reversed upon the facts, said: "There is no such statement in the order now before us. It simply states that there was a reversal and a new trial directed. We are commanded by the statute to treat the decision as one not interfering with the facts found at the trial." Spellman v. Looschen, supra, was a case in which the record disclosed no exceptions taken to the admission and rejection of testimony, and where undisputedly the conclusion of law followed from the facts found, and so Judge Landon said: "The only question of law presented by the record for our review is whether the learned trial court found, without evidence to support it, any fact material to the judgment."

I have called attention to a sufficient number of cases to show not only that the form of the order is a familiar one in this court, and ofttimes the subject of consistent adjudication, but also that the form of the decision under review is not strange to this court, for it has received careful consideration,

since the amendment of section 1338 of the Code in 1895, and the adoption of the new constitution depriving this court of the jurisdiction to review facts with the exception therin provided, and such decisions have been almost universally made by a unanimous court, and, without exception, they deny the power of this court, in such a case as this, to search through the record for facts not in harmony with the referee's or the court's decision, and to incorporate them as facts into that decision in order to support a determination by this court that the conclusion of law of the referee was not supported by the facts found by him; and we should be governed by these decisions even if, according to our present view, they were not well considered, for they have been consistent with each other from the beginning, as the records, covering now more than half of the volumes of the decisions of this court, show. It is true that in none of these cases did the court say that in a short decision an omission to find a material fact not requested does not present an error of law, and for the reason, doubtless, that in all the struggles to avoid the rigor of section 1338, it has never occurred to the minds of counsel before to press such a claim on the attention of the court. But when in various cases this court, as in the Bomeisler and Petrie and other cases, undertook to state the boundaries of our authority to review where the reversal is not upon the facts, and in express terms said that the only questions of law which we may review must relate to the admission and rejection of testimony, to the question whether the conclusion of law is supported by the facts found, or whether any material finding of fact is without any evidence to support

it, we necessarily excluded the question under discussion, with all others not named; that is, we decided that certain questions can be reviewed and that no others can, and to the latter class belongs the alleged question of law which we are considering. Assuming, however, for the sake of argument, that the question has never been decided,—that it is as open for decision as if the dozens of cases which have been before this court during the last five years had never been decided,—and it seems to me quite clear, to say the least, that it suggests no error in the decisions made. Now, in what does this alleged error of law consist? It is said to consist in the omission of the referee to find a material question of fact which was conclusively proved. If that constitutes an error of law, then in every case where the reversal is not upon the facts, the attention of this court will be invited to an investigation of the record to see whether some fact was not conclusively proved which does not appear in the decision, and it will be strange indeed if it cannot be found, whereupon the ingenuity of counsel will be exerted to convince us that it is a material fact. What, then, would be left of the command of section 1338 of the Code? Nothing, practically; for experience teaches that we should become investigators of the facts, and in cases such as this, where inferences of fact may be drawn from facts and circumstances proved, it will be argued that that the fact was conclusively proved.

But, passing the effect of such a decision, we come to a consideration of the question whether an omission to find a fact not requested constitutes an error of law. The precise form in which the proposition is presented is as follows: "Where a fact

is pleaded and conclusively proved on a trial, which is fatal to the judgment rendered, the failure to find that fact is an error of law for which the judgment is properly reversed by the appellate division as erroneous in law." There are several answers to this contention. One is that it cannot be legal error to omit to insert in a report of a referee, or in a decision of a trial court, a material finding of fact, the finding of which has not been requested, for the reason that the statute explicitly asserts that this need not be done. Code, §1022. That section provides in terms that a court or referee may state separately the facts found and the conclusions of law, or may file a decision stating concisely the grounds upon which the issues have been decided. Clearly, it cannot be seriously contended, when the statute provides that the facts need not be separately stated, but that it is sufficient to state concisely the grounds upon which the issues have been decided, that an omission to find a material fact in a short decision constitutes error of law. In other words, that, in doing what the law expressly permits, error of law is committed by a trial court or a referee. In this case the referee filed a decision stating concisely the grounds upon which he decided the issues. In so doing, he conformed to the requirements of the statute, and, whatever errors he may have committed in passing upon either question of law or fact, he did not commit an error of law in omitting to incorporate into his decision every material finding of facts established conclusively or otherwise by the evidence.

There are still other answers to the contention made, one of which is that there is no exception which presents for our review any such question

as that suggested. It is true that formerly it was held to be an error of law to omit to find a fact requested when conclusively established, and that an exception taken to such a refusal presented an error of law for review in this court. But there is no such request here, and no exception taken to a refusal to find; and, furthermore, it ever was the law in this state that an omission to find a fact not requested constituted error of law. The presentation of requests to find finally became so burdensome to the courts, and so unfruitful in results, that in 1894 section 1023 of the Code was literally swept away. Now, upon the happening of that event, the rule of law which had been builded by the courts, and subsequently incorporated into the Code, that a refusal to find a fact requested, which was conclusively established by the evidence, if excepted to, constituted error of law reviewable in this court, either survived the repeal of section 1023, or passed away with it. If the rule of law formerly in vogue survived the repeal of section 1023, then the law upon that subject is that a request for a finding must be made and refused, and an exception noted, in order to present a question of law for this court. Clearly, no such thing happened in this case. If the rule of law formerly obtaining went out of existence with the repeal of 1894, it is as dead as the section repealed, and can no more be invoked in this court than the repealed section. It is my view that the repeal of section 1023, considered in connection with the repeal in the year following of section 993 and various amendments to other provisions of the Code by chapter 946 of the Laws of 1895 (a chapter in part made necessary by the amendment of

the constitution affecting the powers of both this court and the appellate division), operated to wipe out of existence the practice touching the review of findings of fact in this court. The legislature was of the opinion that only radical measures could accomplish that result, and hence the absolute repeal of section 993, which read as follows: "Upon the trial of an issue of fact by a referee, or by the court, without a jury, a refusal to make any finding whatever, upon a question of fact, where a request to find thereupon is reasonably made by either party, or a finding without any evidence tending to sustain it, is a ruling upon a question of law, within the meaning of the last section." What possible purpose could the legislature have had in repealing that section except to take away from this court the temptation to follow in the beaten paths of decision? Now, however, although the statute which it was supposed was our guide in such cases has been repealed, we are invited to go a step further than either the statute or the decisions ever went, and hold that a mere omission to make a finding of fact, although not requested, constitutes an error of law reviewable in this court.

But I forbear further discussion of this question. The suggestion is also made that, if it must be held that the effect of the amendment of section 1338, considered in connection with the repeal of section 993 and the various amendments made to other sections of the Code, was to prohibit the court from holding that a failure to find any material fact proved presents an error of law, there is nothing to prevent the court from holding that a failure by the referee or trial court to give effect to a fact proved is an error of law. To my mind that suggestion

needs no other answer than that during all the years that our system of practice has been developing this court has neither held nor said that a failure to give effect to a fact proved, but not found, constitutes error of law, but, on the contrary, has stated what the questions of law are that they may be reviewed, and has thus excluded this and other alleged questions of law that may be hereafter evolved. Again, it is not pretended that under the practice existing prior to the repeal of section 993 there was any such rule of law in existence, but it is in effect argued that, the right to say whether it was error to refuse to find a particular fact having been taken away from this court, it should now be held that the result was to confer upon this court the right to examine the entire record; and if, as a result, we find that a certain fact was proved, which had it been given effect, would have led to a different conclusion, we may hold that an error of law was committed. There is nothing in any amendment to the Code suggesting such a purpose on the part of the legislature. On the contrary, there is to be found therein conclusive evidence that the legislature intended to cut off all possibility of a review of facts by this court, whether under the guise of a review of questions of law or otherwise. The constitution that went into effect January, 1895, sought to prohibit this court from reviewing questions of fact, and to that end, in terms, limited the jurisdiction of the court to questions of law. It also provided that the legislature might "further restrict the jurisdiction of the court of appeals and the right of appeal thereto." In the presence of this situation, the legislature set about the enactment of such legislation as should give effect to this new

policy of the organic law, which intended to make a court of great dignity, consisting of five justices of the supreme court, called the "appellate division," the court of final review as to all questions of fact, and in many cases as to questions of law as well. And as section 993 afforded the only statutory opening through which this court could enter upon a review, wholly or partially, of the evidence when the reversal of a court or referee was upon the law, it was repealed; not amended, but effaced from the pages of the Code. Other amendments to various sections of the Code were made by the same act (chapter 946 of the Laws of 1895), but all that were germane to this question tended in the same general direction. I shall not stop, however, to analyze them, but content myself with the assertion made, as there is no room for controversy as to the tendency of the amendments. Our duty in the premises is plain. It is to observe the boundaries of our jurisdiction faithfully, and thus to carry into effect the scheme which the framers of the constitution devised and the people approved. And, while thus observing them, we shall have the satisfaction of knowing that harm will not result to litigants because we are prevented from reviewing facts, for section 1022 provides that "the appellate division of the supreme court shall review all questions of fact and of law." It may be that occasionally in the future as in the past effect may not be given to the intentions of the court by the draftsman of the order or judgment but the remedy is to be found in an application to the appellate division to so amend the order or judgment as to express the will of the court, not in an appeal to this court to assume jurisdiction over

questions that have been advisedly taken from it. We are unable to find in this record any errors of law upon which the appellate division could reverse the judgment, and, as the form of the order requires us to assume that the reversal was had upon errors of law, we must reverse the judgment. The judgment of the appellate division should be reversed, and the judgment of the special term affirmed, with costs.

CULLEN, J. (dissenting). This action is brought on two written agreements annexed to the complaint, under which the defendant obtained licenses from the plaintiff, which was the owner of certain patents, to manufacture patented articles, and in consideration thereof agreed to pay a stipulated royalty, and to abstain from manufacturing other articles. The defendant answered, setting up, among other things, that the two license agreements declared on were a part of and made in persuance of another agreement annexed to the answer, the purpose and object of which was to limit and control the production and market price of strong-tooth harrows in the United States, which contract, it was alleged. was illegal and void as in restraint of trade. The referee rendered judgment for the plaintiff, making the short form of decision authorized by section 1022 of the Code of Civil procedure, in which he ignored the agreement set forth in the answer. The case states that it contains all the material evidence. On appeal the appellate division reversed the judgment and ordered a new trial, but, as the order does not declare that the judgment was reversed upon the facts, under section 1338, it must be assumed that

it was based on errors of law alone. In my opinion, the defendant conclusively proved by uncontroverted evidence that the two agreements declared on by the plaintiff were made in persuance of the prior agreement referred to in the answer, and the written instruments, construed together, show an illegal combination. This was so held in Harrow Co. v. Quick (C. C.) 67 Fed. 130; Same v. Hench (C. C.) 76 Fed 667; Id., 29 C. C. A. 681, 85 Fed. 991. In the views expressed in those cases I entirely concur, but it would be unprofitable to pursue the discussion in this respect, as the majority of the court hold that we cannot look into the record to see if the defendant has conclusively proved its defence, but are confined to the inquiry whether the facts found by the referee in his decision have the support of evidence, and, if there is evidence to sustain them, whether they authorize the judgment rendered. From this view of the practice and the power of the court I am constrained to dissent. The difference in opinion between the majority of the court and myself is occasioned by the repeal of section 1023 of the Code and the amendment of section 1022, which authorizes the short form of decision. We all agree that the reversal by the appellate division in this case can be supported only for some error of law committed by the trial court. The difference between us is as to what is an error of law. I think that where a fact is pleaded and conclusively proved on the trial, which is fatal to the judgment rendered, the failure to give effect to that fact is an error of law for which the judgment is properly reversed by the appellate division as erroneous in law. Of course, if there is a conflict of evidence, or if the

evidence admits of different inferences, or the credibility of witnesses is involved, the question is one of fact and not of law; also, of course, this rule applies only to issuable or traversable facts, and not to facts which are merely evidence from which the existence of other facts may be inferred. In the present case it is not necessary to go even to the extent stated, for the defense rests on uncontroverted documentary evidence. In determining the effect of the amendment of section 1022 and the repeal of section 1023, it is vital to bear in mind the distinction between the questions of law and the practice that may be necessary to raise those questions on appeal. If an action is brought on a promissory note, and the statute of limitations is pleaded, it can hardly be denied that the question of what limitation applies is one of law, and that an instruction that it requires the lapse of 10 years to bar the claim would be erroneous. If no exception, however, were taken to the ruling of the trial court in this respect, the defendant would be precluded from taking advantage of the point on appeal, not because the question was not one of law, nor because the ruling was not erroneous, but simply because he had not adopted the proper practice to correct errors. It is a mistake to suppose that a failure to give effect to a defense or to a cause of action conclusively proved was made an error of law solely by virtue of section 1023 of the Code. On the contrary, the principle that, where the facts concerning an issue which necessarily controls the disposition of a cause are uncontroverted, a question of law only is presented is as old as the maxim, "Ad quæstionem facti non respondent judices, ad quæstionem legis non re-

spondent judices, ad quæstionem legis non respondent jurartores," a maxim the Latin of which has been criticised, but its doctrine in civil cases never impugned. Under the old Code there was no statutory provision for requests to find, yet as early as Pratt v. Foote, 9 N. Y. 463, it was said, "Where, however, there is no conflict of evidence, and no dispute about the facts of the case, the conclusion to be drawn from these facts is a question of law." In that case a judgment on a promissory note was reversed because the court was of the opinion that the facts proved amounted to a payment. In Mason v. Lord, 40 N. Y. 476, it was said by Graver, J.: "When it is the finding of a fact without any evidence, or the refusal to find a fact proved by uncontroverted evidence, it is a legal error which is available in this court." It is conceded that the first proposition remains true to this day. Shotwell v. Dixon, 163 N. Y. 43, 57 N. E. 178. It is clear that the second proposition was equally true up to the time of the amendment of the Code referred to. See Beck v. Sheldon, 48 N. Y. 365; Bryce v. Insurance Co., 55 N. Y. 244; Kaehler v. Hughes, 148 N. Y. 507, 42 N. E. 1051. It is true that in the early history of this court the practice was established that to take advantage of an error in failing to find a fact conclusively proved it was necessary that a request to find that fact should be made. But the request to find did not create the error of law. It was merely prescribed as the proper way of raising the question of law upon appeal, and in this respect is analogous to an objection and exception. On this question the case of People v. Dederick, 161 N. Y. 195, 55 N. E. 927, seems controling. In that case, which was a pro-

ceeding to review an assessment for taxation, the judgments of the special term and appellate division were reversed in a part because it appeared by undisputed evidence that a portion of the indebtedness for which the relater claimed exemption was incurred for the purchase of the good will of another company. There was no finding in the courts below of such a fact, but this court said, per Haight, J.: "The testimony upon this subject is undisputed, and we are, therefore, of the opinion that a question of law is presented. * * * This testimony, we think, permits us to properly treat as a fact in the case that at least one-half of the increased bonded indebtedness created in 1893, to wit, $150,000, was contracted for the good will of the business of the company then purchased by the relator." Since the constitutional amendment of 1895, the jurisdiction of this court has been limited to the review of questions of law. If it is the request to find, and not the state of the proof, that creates the question of law, I cannot see how this court could have modified the judgment, for in the proceeding there was no request to find, nor was any request permissible. In these respects the condition of a special proceeding and that of an action where a short decision is rendered are the same. Bearing in mind the difference between questions of law and questions of practice, as to the proper method of raising questions of law, we now come to the effect of the Code amendments. By section 1022, "whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision, in which case, on an appeal from the judgment entered thereon upon a case containing exceptions,

the appellate division of the supreme court shall review all questions of fact and of law." If I am right in the view that it is the state of the proof, and not the request to find, that creates the question of law, then this provision would seem to give the appellate division ample power to reverse this judgment as erroneous in law, provided the proof of the illegality of the contract was conclusive an uncontroverted. The general exception is by the Code made a substitute for all other methods of raising questions of law. The repeal of section 1023 of the Code is not in conflict with these views. That section went beyond the state of the law at the time of its enactment. It made a new error of law; that is, a failure to pass upon and decide one way or the other a material question of fact, where the evidence was conflicting. James v. Cowing, 82 N. Y. 450. The repeal of the section only abolished the question of law which it had created. It does not affect a case where the proof is uncontroverted. If this action had been tried before a jury, as it well might have been, so far as the matter of damages is concerned, the defendant would undoubtedly have had the right, by a motion to direct a verdict in its favor, to have the question whether, upon all the evidence in the case, the illegality of the contract was not conclusively proved, decided as a matter of law. I do not think that it should lose that right because the case has been tried before a referee, nor do I believe that a change in the mode of trial from a court and jury to a referee or court alone can transmute a question of law into one of fact. The practice which the court is about to establish by its decision in this case I fear may cause serious embarassment to litigants, and in many

instances deprive them of their rights. A defendant may set up in answer to a claim a discharge in bankruptcy, a general release, a prior adjudication, or other matters which generally present only a question of law. If the referee, in his short form of decision, ignores these defences because he holds them insufficient, there will be no possibility of review of the questions in this court; for, if such a decision presents a question of fact and not of law at the appellate division, it is equally so in this court, and this court has no jurisdiction to review questions of fact.

I do not think the dicta quoted from the long list of authorities cited by the appellant's counsel that this court is limited on appeal to an examination whether there is any evidence to support the findings of fact, and whether those findings justify the conclusions of law, should control our decision. There are at least five recent decisions of this court in which statements are to be found in the opinions, which, taken without reference to the cases then before the court, would seem to deny our power to examine the question whether there is any evidence to support the findings of fact. Bomeisler v. Forster, 154 N. Y. 237, 48 N. E. 534, 39 L. R. A. 240; Snyder v. Seamen, 157 N. Y. 449, 52 N. E. 658; Petrie v. Trustees, etc., 158 N. Y. 463, 53 N. E. 216; Farleigh v. Cadman, 159, N. Y. 175, 53 N. E. 808; Smith v. Improvement Co., 161 N. Y. 489, 55 N. E. 1100. Yet there is no question but that this court has such power, except in case of a unanimous affirmance below. We have recently protested against the practice of excerpting expressions from judicial opinions, and reading them without reference to the cases in which they were

rendered, and have shown the errors to which such a practice may lead. Fealey v. Bull, 163 N. Y.—, 57 N. E. 631. The statements in the various cases cited by the counsel for the appellant, as well as those cited in this opinion, were entirely justified, because they were made with reference to the questions raised by the records in the particular cases then before the court. If it be not permissible for a judge to make such an assertion without at the same time stating all the possible limitations and exceptions to the rule declared, the prolixity of judicial opinions oftentimes necessarily great, will become intolerable. Stability and uniformity in the administration of the law is to be obtained by adhering to the propositions actually decided or necessarily involved in the decision, not to dicta in opinions. I can find no case in which the question presented on this appeal has been decided. I think the order of the appellate division should be affirmed, and judgment absolute rendered for the defendant on the stipulation.

BARTLETT, J. (dissenting). I agree with the general reasoning in Judge CULLEN'S opinion, but rest my vote in this case solely upon the fact that the judgment entered herein on the report of the referee is contrary to the undisputed documentary evidence. The situation here presented is made clear by a simple illustration: A. sues B. upon his promissory note. The case is sent to a referee to try the issues, who find the execution of the note, the amount alleged to be due thereon, and orders judgment therefor. On appeal the appellate division reverses on the law alone. On further appeal to this court the record discloses that the defendant

pleaded and proved a discharge in bankruptcy and a general release, both of which were in law a satisfaction of the note; that the referee handed down the short form of decision, in which no reference was made to the documentary proof referred to, and the defendant filed an exception to the decision. It thus appears that by pleading, proof, and exception the defendant has availed himself of, every remedy afforded by the Code of Civil Procedure. If it be true that this condition of the record does not present a pure question of law, then it follows that the defendant is remediless, and the Code of Civil Procedure cannot be too speedily amended.

GRAY, MARTIN, VANN, and WERNER, JJ., concur with Parker, C. J. CULLEN and BARTLETT, JJ., read dissenting memoranda.

Judgment reversed, etc.

No. 215.

HENRY J. COOKINHAM,
UTICA, N. Y.

Supreme Court of the United States.

Brf. of Cookinham & Wood

Supreme Court, U. S.
FILED
MAR 13 1902
JAMES H. McKENNEY,
Clerk.

No. 215.—October Term, 1901.

Filed March 13, 1902.

E. Bement & Sons,
Plaintiff in Error,
vs.
The National Harrow Company,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

EDWARD CAHILL & CLARK C. WOOD,
Solicitors for Plaintiff in Error.

H. J. COOKINHAM,
Of Counsel.

UTICA, N. Y.:
THOMAS J. GRIFFITHS, LAW PRINTING.
1902.

Supreme Court of the United States.

No. 215.—October Term, 1901.

E. Bement & Sons,
Plaintiff in Error,

vs.

The National Harrow Company,
Defendant in Error.

This is a writ of error to the Supreme Court of the State of New York to review a decision of the Court of Appeals of that state, reversing a judgment entered in the Oneida County Clerk's office June 22, 1900, upon a decision of the Appellate Division of the Supreme Court, which judgment reversed a judgment entered upon the report of the referee in favor of the National Harrow Company awarding that company $20,985.00 damages and $1,525.23 costs, decreeing specific performance of the contracts sued upon and awarding to defendant in error an injunction restraining the plaintiff in error, E. Bement & Sons from violating the same.

The subject of the suit is spring tooth harrows.

The questions are as to the contracts being in restraint of trade, forming an illegal combination, and that they are in violation of the Act of Congress protecting inter-state commerce.

This action was brought in October, 1894, upon two contracts, both of which are set out in full as exhibits to the complaint. These two contracts are identical in form, except that they apply to different harrows and to somewhat different territory.

On page 2 of the brief of the counsel for the defendant in error on his motion to dismiss the appeal he states: "That the exceptions which raised questions of law in the case were by the act of the parties stipulated out of the case after the judgment had been entered on the decision of the referee." This is an error, as no stipulation upon that subject was made by the parties except the one found on pages 389-390 of the record, and that does not eliminate any law questions from the case except those which arose upon the reception or rejection of evidence.

The stipulation expressly states what the questions are to be considered, among which is the only one to be discussed in this court, viz.: That the contracts are in violation of the Act of Congress of July 2, 1890, in regard to inter-state commerce.

This act was pleaded in the answer as a defense to the action. The defendant in error is the successor,by assignment, of the National Harrow Company of New York to whatever rights it has in the contracts in suit. These contracts, although dated April 1, 1891, were not in fact made until June 16th or 17th of that year.

I SHALL DISCUSS THE QUESTION RAISED BY THREE ASSIGNMENTS OF ERROR, WHICH ARE AS FOLLOWS:

11½.

"The court erred in holding that the failure of the referee to give effect to the undisputed fact that contracts Exhibits A and B attached to the bill of complaint where in conflict with the Act of Congress, approved July 2d, 1890, and was not an error of law.

12.

The court erred in holding that, upon the facts found by the referee and on the face of the contracts themselves, they are not in violation of the Act of Congress known as Chapter 647 of the Laws of 1890, and in not holding that the contracts are in violation of said act.

13.

The court erred in holding that, upon the facts found by the referee and on the face of the contracts themselves, the conceded facts, and facts conclusively proved, the contracts are not in violation of the Act of Congress known as Chapter 647 of the Laws of 1890, and in not holding that the contracts are in violation of said act."

AS TO THE FACTS BEFORE THIS COURT.

The first thing to be determined by this court is just what is before it in view of the peculiar practice in the state of New York. It is not my object to argue that this court will not be controlled by the construction given by the Court

of Appeals of the State of New York to any statute of that state, but it is my purpose to show here that the New York Court entirely misconstrued the referee's report and overlooked the fact that by his findings all of the material contracts between the parties and the material facts in the case were properly before that court, and that, this being the case, the contracts are clearly in violation of the act of Congress protecting inter-state commerce.

I here quote the portion of the referee's report which bears upon this question: Record, p 63:

"This corporation (The National Harrow Company of New York) entered into some contracts with spring tooth harrow manufacturers which were decided by the Supreme Court of the state of New York to be illegal, as against public policy on account of restraints contained in the contracts which extended beyond the life time of the patents. That case is reported in the New York Supplement, vol. 18, page 224, Strait et al. vs. National Harrow Company et al. Immediately following this decision all of the contracts then in existence which were effected thereby were immediately canceled by the parties to such contracts. * * * The defendant had no contract with the National Harrow Company until about June 16th or 17th, 1891,at which time several contracts were entered into between the defendant and the National Harrow Company of New York. Among other contracts the defendant executed and delivered assignments in writing of several U. S. letters patent and license

rights and privileges under U. S. letters patent, all of which related to the defendant's float spring tooth harrow business. Such contracts constituted an absolute sale of the property and the privileges thereby transferred, and the defendant agreed to accept in payment therefor the paid-up capital stock of the National Harrow Company of New York, and the value of the rights transferred were by agreement between the parties fixed and determined by an arbitration under which arbitration the defendant was awarded and the value was fixed at upwards of $29,000. * * * The transactions between the National Harrow Company of New York and this defendant had in June, 1891, was intended by the parties to be an absolute sale by the defendant to the National Harrow Company of New York of the U. S. letters patent and licenses under U. S. letters patent, relating to float spring tooth harrow business conducted by the defendant, was founded on a good, valuable and adequate consideration moving between the parties. That as part of such transaction the National Harrow Company of New York granted, issued and delivered to the defendant the license contracts "A" and "B" which are attached to the complaint in this action and made a part thereof. Upon the consummation of the transaction in June, 1891, the controversy over patents and infringements existing between the first six firms named above and the defendant and its customers were settled. The papers which were exe-

cuted in June, 1891, were all dated as of April 1, 1891, and were to take effect as of that date. * *

I decide that the contract entered into in June, 1891, including the contracts "A" and "B" between the National Harrow Company of New York and this defendant, were and are good and valid contracts founded on adeqate considerations and were reasonable in their provisions; contracts "A" and "B" imposing no restraints upon the defendant beyond those which the parties had a right from the nature of the transaction to impose and accept. * * *

I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in court, having jurisdiction, and that all the contracts in evidence were and are legal, valid, and binding contracts such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embody no illegal restraint and are not repugnant to any rule of public policy as in restraint of trade or tending to create a monopoly, trust or any other illegal combination, and that the contracts entered into between the defendant and the National Harrow Company of New York, including the contracts "A" and "B," are and were intended to be continuing contracts and should be enforced according to their true intent and meaning as hereby interpreted.

I decide that the plaintiff is entitled to judgment in this action against the defendant as follows:

1st. Declaring the validity of the plaintiff corporation and its title to contracts "A" and "B."

2d. Decreeing that the contracts, including contracts "A" and "B," are good and valid contracts in law." * * *

On examining the opinions of the Court of Appeals it will appear that the New York court treated the case as though no part of the contract was before it except the portion contained in Exhibits "A" and "B" attached to the complaint. This is clear from the fact that Judge Cullen, who wrote one of the dissenting opinions, states that the "referee rendered judgment for the plaintiff, making the short form of decision authorized by section 1022 of the Code of Civil Procedure, in which he ignored the agreement set forth in the answer." (Page 14, Appendix to brief of my associates.) This is so manifest an error on the part of the Court of Appeals as to be incredible. If that court had examined the record with care, it would not have failed to discover that the referee had treated the making of all the agreements as one transaction and in express terms passed upon them all and held them all to be valid. He found (R., p. 63) that "The defendant had no contract with the National Harrow Company until June 16th or 17th, 1891, at which time several contracts were entered into between the defendant and the National Harrow Company of New York. Among other contracts the defendant executed and delivered assignments in writing of several U. S. letters patent, etc. * * *

and agreed to accept in payment therefor paid-up capital stock of the National Harrow Company of New York, and the value was to be fixed by arbitration.

He then (R., p. 64) referred to the "transaction" in June, 1891, as transferring absolute title of the patents to the National Harrow Company, and says: "That as part of such transaction the National Harrow Company of New York granted, issued and delivered to the defendant the license contracts "A" and "B" which are attached to the complaint. Upon the consummation of the transaction in June, 1891, the controversy over patents and infringements existing between the first six named above and the defendant and its customers was settled. The papers which were executed in June 1891, were all dated as of April 1st, 1891, and were to take effect as of that date." He then concluded as follows: "I decide that the contract entered into in June, 1891, including the contracts "A" and "B" between the National Harrow Company of New York and this defendant were and are good and valid contracts founded on adequate considerations and were reasonable in their provisions contracts "A" and "B" imposing no restraints upon the defendant above those which the parties had a right from the nature of the transaction to impose and accept. * * * *

He then decides that "all the contracts in evidence were and are legal, vaild and binding contracts such as might reasonably be

made under the circumstances, and that the contracts entered into between the defendant and the National Harrow Company of New York, including the contracts "A" and "B," are and were intended to be continuing contracts and should be enforced according to their true intent and meaning as hereby interpreted."

It is apparent that the referee found and intended to find that the entire transaction between the parties which resulted in the making of all these several agreements, was a legal transaction, that the contract as a whole was valid and not in violation of the act of Congress.

He expressly states that they embody "no illegal restraint and are not repugnant to any rule of public policy or in restraint of trade or tending to create a monopoly, trust or other illegal combination." He also finds that all the contracts put in evidence are legal and binding contracts.

The defendant in error put in evidence all of the important contracts. Exhibits 1 and 2 in evidence are respectively Exhibits "A" and "B" attached to the complaint. Exhibits 3 and 4 in evidence are respectively Exhibits 6 and 5 of the amended answer. Exhibit 5 in evidence is an agreement between the parties by which plaintiff in error promised to pay one dollar on each harrow from September 10, 1890. The defendant in error put in evidence all these five contracts, and the referee found them to be legal and binding contracts.

R., pp 7; 19, 20; 8, 63, 68, 72.

THE NEXT INQUIRY IS AS TO THE POWERS OF THE COURT OF APPEALS IN THE CASE AS IT WAS PRESENTED TO THAT COURT.

The jurisdiction of that court is conferred by Section 9, Article 6, of the Constitution, as amended in 1894, which reads as follows:

"After the last day of December, one thousand eight hundred and ninety-five, the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them. The Appellate Division in any department may, however, allow an appeal upon any question of law which, in its opinion ought to be reviewed by the Court of Appeals.

The Legislature may further restrict the jurisdiction of the Court of Appeals and the right of appeal thereto, but the right of appeal shall not depend upon the amount involved.

The provisions of this section shall not apply to orders made or judgments rendered by any General Term before the last day of December, one thousand eight hundred and ninety-five, but appeals therefrom may be taken under existing provisions of law."

It certainly was not the intent of the convention to place the Court of Appeals in such a position as it could not consider conceded facts or facts conclusively proved. I speak this from knowledge, having, as a member of the judiciary committee of that convention, assisted in framing this section. Subsequent to the adoption of this provision, the Code of Civil Procedure, that accumulated legislative folly of the ages, was amended in regard to appeals to the Court of Appeals and the section in question now reads as follows:

"Section 1338. Upon an appeal to the Court of Appeals from a judgment, reversing a judgment entered upon the report of a referee or a determination in the trial court; or from an order granting a new trial, upon such reversal; it must be presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears in the record body of the judgment or order appealed from."

A condition of affairs was brought about in this case that perhaps never existed before in any litigation. The plaintiff in error was defeated in the Court of Appeals, solely because of a differ-

ence between that court and the Supreme Court in regard to a question of practice.

The referee made what is known under the New York Code as the short form of a report, provided for by Section 1022 of the Code of Civil Procedure, in which he did not find fully upon the facts, but simply stated concisely his reasons for deciding in favor of the defendant in error. An appeal was taken to the Appellate Division of the Supreme Court, which has full power to hear the case de novo. This court had the right to confirm, reverse or modify the judgment in any particular that justice required. It reversed the judgment upon questions of law holding that, upon the facts found by the referee and the conceded facts and facts conclusively proved,the contracts were in restraint of trade and void. The case was then appealed by the defendant in error to the Court of Appeals, and it came on for hearing. At this time there were but two judges alive who heard the case in the Appellate Division. The counsel for the plaintiff in error here communicated with the two judges and asked whether or not they had understood that they reversed the judgment entered upon the referee's report upon questions of fact as well as upon questions of law. Both of the then living judges replied that they did not reverse upon questions of fact but only on questions of law. The plaintiff in error was at that time in this position: The Appellate Division held that it had the right to consider conceded facts and facts conclusively proved in connection with the contracts, in determining as

a question of law whether or not the contracts were void. The Court of Appeals held that it could not consider conceded facts or facts conclusively proved; that it must be confined solely to the facts found by the referee and such as would tend to support his finding. The plaintiff in error was therefore beaten by the Court of Appeals, not because it was wrong, but because five judges in that court differed with four judges of the Appellate Division as to the practice. The five judges of the former held that conceded facts and facts conclusively proved could not be considered, whereas the four judges in the Appellate Division, as one took no part in the decision, held that the consideration of conceded facts or facts conclusively proved was a question of law and not one of fact. One of the judges of the Court of Appeals has well said recently, "This case gave us a great deal of trouble at the time and is still giving us trouble."

I believe this is the first time in the history of jurisprudence where a court has declined to take into consideration in deciding a case material conceded facts and those conclusively established.

Whatever conclusion this court may come to as to its right to consider all the facts in the case, I submit it should consider enough to conclude that contracts "A" and "B," being but part of an entire contract found by the referee, are in violation of the federal statute against trusts and monopolies.

It has been shown above that the referee found sufficient facts to enable the court to take into consideration all the material questions in dispute concerning the validity of the contracts.

The New York court had before it, by the express finding of the referee, all the contracts put in evidence and the facts which warranted the referee in finding they were made as proved in the case. It is contended by the plaintiff in error that this is sufficient to show a transaction formulated into a contract which was in violation of the federal statute.

It will not, I presume, be contended that a contract in separate parts is in effect any different from one containing the same provisions in one paper. Treating the several agreements as one contract, I will therefore now state its substance.

I first refer to the escrow agreement known as Exhibit 4 in evidence, 5 of the amended answer. This is that part of the contract upon which the whole scheme of effecting a combination is founded. It provides that "whereas the National Harrow Company is the owner of a large number of patents relating to float spring tooth harrows and is desirous of granting licenses thereunder to the following persons, firms and corporations, to wit: Chas. H Childs & Company, D. B. Smith & Company, A. W. Stevens & Son, Childs & Jones, Syracuse Chilled Plow Company, Geo. W. Sweet & Company, Walker Manufacturing Company, Taylor & Henry, The Herndeen Manufacturing Com-

pany, D. C. & H. C. Reed & Company, L. C. Lull & Company, Williams Manufacturing Company, W. S. Lawrence, McSherry Manufacturing Company, D. O. Everest & Company, E. Bement & Sons, Hench & Dromgold, Farmers' Friend Manufacturing Company, Eureka Mower Company.

And whereas, the National Harrow Company has placed in the hands of E. Norris in escrow, duly executed by it in duplicate, a certain contract and license for each of said persons, firms and corporations.

Now, therefore, it is hereby understood and agreed by and between the parties hereto, that as the said licenses and contracts are signed and executed by the said respective persons, firms and corporations, they shall be held by said Norris, in escrow, for both parties until such time as all of said above-named persons, firms and corporations shall have signed, executed and delivered the same to said Norris, whereupon they shall become operative and immediately thereafter the said Norris shall deliver one of the duplicates of each of said contracts and licenses to the said National Harrow Company and the other duplicate thereof to the respective licensees who have signed the same; in person or by mail.

But in case any of the above named persons, firms and corporations shall neglect or refuse to sign, execute and deliver said respective contracts and licenses, on or before the first day of June next, then and in such case said E. Norris shall, provided he shall be so directed, by a reso-

lution duly adopted by the board of trustees of said National Harrow Company, make delivery of such of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall become operative, and in case of the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then and in such case the said Norris shall cancel each of said contracts and licenses, and they shall be null and void."

It will be noted that a part of the arrangement is that the license and the contracts were to be left in escrow in the hands of Mr. Norris only to be effective when all the parties named had signed the papers and left them with Mr Norris or until the trustees of the National Harrow Company should direct the papers to be de livered.

The second of the papers is what is known as the arbitration agreement and is the paper known as Exhibit No. 3 in evidence, No. 6 of the amended answer. This part of the contract provides for the arbitration to fix the amount of the capital stock of the National Harrow Company of New York to be paid to the different parties to the agreement for the patents and rights which they were to turn over to the National Harrow Company by the terms of the agreement. This paper also ratifies and confirms the assignment of patents, etc., to the National Harrow Company which had been assigned to it under the

papers which had been declared invalid by the Supreme Court of the State of New York, and it also provides that such rights as had been transferred by the party of the second part to the National Harrow Company by the first set of papers, were transferred back to the party of the second part.

The other part of the contract is that portion contained in Exhibits "A" and "B" attached to the complaint, which is the same form as Exhibit 7 attached to the amended answer. This portion of the contract is called the license and is the paper sued upon. It mentions the patents owned by the National Harrow Company which were those transferred to it by the parties named in the escrow agreement. It also fixes the terms upon which harrows are to be sold and paid for and the territory where harrows are to be sold at the particular price fixed by the contract..

The fifth exhibit is the agreement by plaintiff in error to pay royalty from September 10, 1890, that being the date of the first set of papers agreed to by E. Bement & Son. All of which papers had been declared void by the Court in the Strait case.

Taking all these papers together as one contract, an agreement is made between the National Harrow Company of New York and the plaintiff in error to execute certain papers and to leave them in the hands of Mr. Norrs in escrow, none of them to be operative until eighteen other concerns engaged in the manufacturing of spring

tooth harrows shall join these two parties in the same agreements or until the National Harrow Company shall resolve by its board of trustees to allow the papers to be delivered, although less than the whole number have executed them.

It is clear therefore that all the written contracts made by the parties were properly before the New York court and that the effect of the decision of that court was to determine that all the agreements treated as one entire contract was not in restraint of trade nor against public policy, nor inimical to the act of Congress protecting inter-state commerce.

My contention is that as the case is presented here it is precisely the same as though the courts of New York had held in express terms that the contract consisting of all the papers executed by the parties in June, 1891, did not fall under the prohibition of the act of Congress. The act having been pleaded as a defense in the suit, no decision could be rendered against the plaintiff in error unless the court held that the contracts were not in violation of the federal statute.

AS TO THE CONTRACTS BEING IN VIOLATION OF THE ACT OF CONGRESS KNOWN AS CHAPTER 647 OF THE LAWS OF 1890.

The statute reads as follows:

Section 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared

to be illegal. Every person who shall make any such contract or shall engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine, not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

This is a general statute and applies to all classes of contracts, combinations, trusts or conspiracies whereby there is an agreement which, in any way, is in restraint of trade or commerce among the several states.

The eighth section of the act provides that the word "person or persons" shall be deemed to include corporations.

The question is whether or not the contract is prohibited by this statute. In arriving at a conclusion it is necessary to examine somewhat in detail the provisions of the papers. The escrow agreement, Exhibit 4 in evidence, No. 5 of the amended answer, is that portion of the contract

upon which the whole transaction is founded. This paper provides for the placing of all the separate parts of the contract in the hands of Mr. Norris to be held in escrow until the happening of one of two contingencies. First, that all the parties named in the paper should execute them, or,

Second, that the National Harrow Company should order the papers delivered, although less than the whole number had executed them. The paper providing for the arbitration plays no prominent part in this branch of the case, but the escrow agreement and the part of the contract known as Exhibits "A" and "B" attached to the complaint are the important ones to establish our contention that the contract has reference to inter-state commerce and that it is in restraint of trade and is an attempt to monopolize and conrol inter-state commerce upon an important article of merchandise. All the contracts are the same in form, although they refer to different harrows and to somewhat different territory. It is a provision of the agreement that no two harrows shall be alike, that is, that no licensee shall make a harrow similar to the harrow made by another licensee. In Schedlue "A" attached to Exhibit "A" of the complaint, the harrows which the plaintiff in error was, licensed to manufacture and sell are described as follows:

1. A float spring tooth harrow, channel or II beam, steel frame (Steel King), marked E.

Bement & Sons, Lansing, Mich. Dated December 16, 1890. No. 14.

2. A float spring tooth harrow, wood frame, lined without teeth, marked E. Bement & Sons, Lansing, Mich. Dated December 16, 1890. No. 15.

Schedule "B" provides a list price for harrows and their parts and also for the terms of sale and the territory wherein they are to be sold at the price fixed in the schedule. The price is arbitrarily fixed with reference to state lines as follows: "A maximum discount of forty-two (42) per cent may be allowed on sales of harrows, harrow frames and teeth in the following territory: All of the New England states; also states of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia. A maximum discount of forty-five (45) per cent may be allowed on all sales made in the territory throughout the United States not mentioned above."

It is difficult to see how a contract could be drawn which would more clearly appear to have reference to inter-state commerce than the one before the court.

The plaintiff in error is a manufacturer of harrows located at Lansing, Michigan. The defendant in error was a corporation organized under the laws of the State of New York, and the contract between these two corporations had reference to the manufacturing of an article of merchandise at Lansing, Michigan, and selling it in all the states of the Union, and fixing the price

arbitrarily at a discount in some of the states of forty-two per cent upon list prices and in other of the states of forty-five per cent discount upon the same list prices.

In order to succeed in the case it was necessary for defendant to show that plaintiff in error had sold harrows; this was done, and it appeared that sales of harrows manufactured in Michigan had been made in many of the other states of the Union.

R., pp 8, 248.

It was first contended that, under this act of Congress, only such contracts were prohibited as were void at common law, but the court held otherwise and said broadly that any contract in restraint of trade was void, provided it had reference to inter-state commerce.

United States vs. Joint Traffic Association, 171 U. S., 505.

United States vs. Trans-Missouri Freight Association, 166 U. S., 290.

Addyston Pipe & Steel Co. vs. United States, 175 U. S., 211.

It will not be claimed that the contracts are not in restraint of trade. The only question which could possibly be raised in that respect is whether or not the restraint is reasonable. Under the federal statute this is immaterial. If there is any restraint and the contract has reference to inter-state commerce, it falls under the prohibition of the statute.

It will be observed that this is not the ordinary case where the owner of patents grants licenses to parties to use patents. In this case the grantor of the right receives the patents by the very transaction which results in its granting the privileges under the patents. That is, it had no right to grant a license to E. Bement & Sons until E. Bement & Sons had transferred to the National Harrow Company the patents which it owned and under which theretofore it manufactured its harrows. It will be clearly seen that the sole object of the parties in transferring their patents to the National Harrow Company, which was simply a tool, was to place in the hands of that company a large number of patents so as to effectively control the trade in this article, drive out other manufacturers, and monopolize the harrow business.

To say that the National Harrow Company had the right to make the contracts "A" and "B" because it owned the patents is to beg the question, for it received the patents through the very transaction that is in issue, and not only one part of the contract is void, but it is entirely void, and the National Harrow Company never owned the patents, the title is still in the parties which assigned the patents as a part of the combination.

I do not controvert the proposition that a patent is, from the very nature of the case, a monopoly, but it is a monopoly of the thing covered by the patent. To this extent the government grants to the patentee a monopoly for the

purpose of encouraging invention. When such patent is granted it becomes the property of the patentee; he has the right to use it or not, to permit others to use it and to attach conditions to the use of it as he may choose. This is, however, the extent of his power under the patented right. He can no more enter into a combination with others holding other patents than can the owner of any other property enter into a combination with the owners of a like property to control a line of trade. No more favorable rule applies to this class of property in this respect than to any other. If owners of patents combine to control or monopolize inter-state commerce, such combination or contract is as inimial to the federal statute as though the combination were made in regard to any other property. In fact, it would seem that a stricter rule should be applied in regard to combinations of patents than to any other class of property, as it is only by favor from the general government that the inventor has a property right in his discovery which he can protect. How, then, should he be heard to say that his right is superior to the right of another over his own acquired tangible property?

Judge Acheson very wisely says in the case of the National Harrow Company against Hench & Dromgold, 76 Federal Reporter, 667: "To the present case may well be applied the remarks of the Supreme Court of Pennsylvania in Morris Run Coal Company vs. Barclay Coal Company. "This combination is a power in its confederated

form which no individual action can confer." This is preisely the situation in the case at bar. The owners of these patents in their confederated form, viz., the National Harrow Company of New York, had a power, if these contracts are valid, greater than they had individually.

See also Heaton Peninsular Button Fastener Company vs. Eureka Specialty Company, 47 C. C. A., 166.

National Harrow Company vs. Hench, 83 Fed. R., 36.

The case of the National Harrow against Hench 84 Fed. R. 226 was a patent suit; the defendant pleaded the illegality of the same transaction, as is in issue here, and the court held it a defense.

The contracts sued upon have been repeatedly held to be in restraint of trade according to the common law If such is the case, how is it possible that they should not be in restraint of trade and tend to form a monopoly in regard to inter-state commerce, provided they are applicable to that subject?

National Harrow Company vs. Hench, et al. 76 Fed. R. 667.

National Harrow Company vs. Hench, et al, 85 Fed. R. 271.

National Harrow Company vs. Quack, 67 Fed, R. 130.

National Harrow Company vs. E. Bement & Sons, 21 Appell. Div. Supreme Court of N. Y. 290.

The referee by inference held the contracts to be in restraint of trade, but decided the restraint not to be unreasonable. He at that time, in 1895, undoubtedly thought that the restraint under the federal statute must be such as rendered a contract void at common law. This was error as the court has since decided.

R. p. 67.

The restraint of trade and the attempt to monopolize the entire business between the states in this particular implement is more effectively shown by the provisions of the contract other than those which refer solely to the price of harrows and the territory in which they are to be sold

In the second sub-division of the contract the so-called licensee is prohibited from selling any goods upon commission or making any rebate or reduction from the price fixed by the licensee except to settle with an insolvent debtor. This clearly prevents the licensee from giving to a customer any reduction of price by reason of increased facilities for producing the goods, or reduction in the price of material, better shipping facilities, or on account of any change of condition. It is apparent that this provision is for the purpose of controlling the sale of the implements.

Consumers in other states than that in which the article is manufactured should be entitled to reap the benefit of healthful competition in trade.

By the third sub-division of the license the licenese is prohibited from selling harrows with

or without teeth manufactured by another licensee at a less price or on more favorable terms of payment and delivery than those fixed by the licenses. This prevents healthful competition in case some other manufacturer should be able to manufacture the goods for less than the licensee himself. There is no patent upon a spring tooth nor upon many of the parts of the frame, nor upon many of the attachments thereto, yet the licensee is prohibited from selling a tooth or any part of the frame except at combination prices, although he might be able to produce it for one-fourth of the price fixed in the license. This provision therefore is not to protect the rights of the defendant in error under any patent, but to effect more perfectly a monopoly of the business. The producer of a haarrow cannot say what the selling price of his goods is to be in future under this contract. He may, by increased facilities, be able to produce his harrows for one-half the selling price fixed in the contracts, yet he cannot reduce the price unless consent is given by the National Harrow Company. The very fundamental principal of trade is violated here. The selling price should bear some relation to the cost of production; in this case it bears none. The price is fixed arbitrarily by the contracts entered into by the parties who combined to control commerce by this contract, and that commerce is between the states, for the price is fixed with reference to state lines. The plaintiff in error under the contracts can sell a harrow in California at a less price than in New York or Pennsylvania. Not

because it cost more to place them in these states but because the combining parties agreed to this provision and placed it in the contracts.

By the sixth subdivision of the license, the licensee is, forever, prohibited from being "directly or indirectly engaged in the manufacture or "sale of float spring tooth harrows or float spring "tooth harrow frames, without teeth or attachments applicable thereto, other than those "which it is licensed to manufacture and market "under the terms of the license, except such as it "may manufacture and furnish another licensee "of the National Harrow Company, and then only "such constructions thereof as such other licensee shall be licensed by the National Harrow "Company to manufacture and sell, except such "other style and construction as it may be licensed to manufacture and sell by the National "Harrow Company."

This provision is intended to prohibit the licensee making any improvement, of any kind, upon the harrow which is licensed to make, or inventing or manufacturing any other style of float spring tooth harrow than that covered by the license. What could more effectively stifle competition and invention than such a provision? The very object of a patented right would be defeated by this provision, if it should be held to be valid. The incentive to invention would be stifled, yet the object of a patent is to stimulate invention, and not stifle it. This is clearly expressed in the federal constitution in conferring

power upon Congress, Article 1, Section 8, Paragraph 8, which is as follows:

"To promote the progress of science and use-
"ful arts by securing for limited times to authors
"and inventors the exclusive right to their re-
"spective writings and discoveries."

The implication is clear in this provision that monopolies are inimical to public good for the "exclusive right" is to continue only for a "limited time."

If, then, the acts of Congress providing for patents in pursuance of the above provision are for the purpose of promoting progress in science and the useful arts as they certainly are, it would follow, that the spirit of the constitution and the statute is violated by this contract.

In this case we have an express provision of the license granted by a combination having control of, substantially all the manufacturers in the United States that the licensees shall never, except by permission of the licensor, make another float spring tooth harrow except it be a duplicate of the one deposited with the treasurer of the National Harrow Co. The principle of law referred to by Judge Smith is as applicable here as to the facts in the Clipper Chilled Plow Co. case, that is that "the mischief of a monopoly is not neces-
"sarily in the fact that the prices are raised, but
"that they have the power to control and raise
"the prices." To paraphrase this sentence we say: "The mischief of this monopoly is not neces-
"sarily in the fact that it will prevent invention,

"but that it has the power to control and pre-
"vent."

Strait vs. National Harrow Co., 18 N. Y., Sup. 224 and cases cited.

National Harrow Co. vs. Quick, 67 Fed. Rep., 130.

The effectiveness of the combination is clearly shown in the seventh clause of the license. It is there provided that, for every harrow sold by the licensee, "contrary to the strict terms and provi-
"sions of this license, he shall pay the sum of five
"dollars liquidated damages." This provision is intended as a deterent to the lincensee, so rigorous, that he dare not take the risk of giving to the trade more favorable terms of purchasing harrows than those stated in the license. None but a courageous man, backed with ample capital, would dare undertake a controversy over the validity of these contracts for the reason that, the consequences of defeat would be disastrous, if he should be compelled to pay five dollars damages for every harrow sold. The scope of this section does not appear without a careful examination. The penalty here provided for selling a completed harrow, in violation of the terms of the license, is five dollars. But the same penalty is provided for selling a frame or an attachment thereto. For instance, one tooth, bolt, or a clip, upon which there is no patent. Still further, to illustrate the extraordinary nature of this subdivision, let us suppose that a manufacturer of wheel harrows desired to purchase

spring teeth of a licensee. There never was but one patent upon spring teeth and that expired long prior to the formation of the National Harrow Company of New York. These teeth are purchased by the tens of thousands. The licensee in such a case as this, though he could make the spring teeth for ten or twelve cents a piece, could not sell those teeth, except at the price mentioned in the license contract, seventy-five cents each, less forty-five per cent. discount, leaving the selling price 41 25-100 cents, without incurring liability to pay five dollars penalty for each tooth. What is true in regard to a spring tooth, is also true in regard to any part of the frame or any attachment thereto, although it might be a bolt, that did not cost to exceed one cent.

The eighth sub-division is an attempt of the combination to put the licensees in a position where they cannot contest the patents.

This sub-division contains an express provision that the licensee "will not alter or change the "construction of the float spring tooth harrows, "float spring tooth harrow frames without teeth, "and attachments applicable thereto, which it is "authorized to manufacture and sell under this "liense in any part or portion thereof which em-"bodied any of said inventions covered by such "letters patent, or any of them, or any re-issue "thereof."

It will be observed here that a licensee is estopped, if this provision be valid, from changing his

harrow or improving it, although it would be impossible for him to tell whether such improved harrow would be in infringement upon any re-issue of a patent to the plaintiff that might be granted subsequent to such improvement of the harrow.

To illustrate this point, suppose the defendant should improve the Steel King Harrow, making it a very much better harrow, such improvement would not be covered at the time by any patent mentioned in the license, but if plaintiff should thereafter ask for a re-issue of one of its patents and such re-issue should be made with further claims and plaintiff should contend that it covered the new harrow of defendant, the defendant would be prevented from ever manufacturing the harrow, or even contesting the validity of the re-issue patent, whether or not it covered the harrow. The fact that a re-issue was granted would prevent a contest on those questions.

The tenth sub-division is very broad. It is an absolute prohibition against the licensee "manu-"facturing, vending or procuring to be manufac-"tured or used, directly or indirectly, any other "or different style of float spring tooth harrow, "float spring tooth harrow frame without teeth, "or attahments applicable thereto, than dupli-"cates of such as are deposited by it with and in "possession of the treasurer of the National Har-"row Company and embraced in this license, or "any part thereof, embraced in or forming a part

"of such invention described in the patents here-
"inbefore mentioned or the reissue of such pa-
"tents, except such portions thereof as it may
"supply to another licensee of the National Har-
"row Company which such other licensee shall
"be licensed to manufacture and sell."

This provision not only prevents the licensee making a complete harrow different from that licensed for itself or for another licensee, but it prohibits the licensee from making any part of any harrow manufactured by any other than a licensee. For instance: No licensee can manufacture a tooth or a bolt, or a piece of malleable iron that goes into the construction of any harrow not licensed without violating this provision, although these separate parts are not patented.

The eleventh sub-division places the licensee in absolute subservience to the will of the National Harrow Company. The well settled rule is that a failure to pay a royalty, or any other breach of a royalty contract does not authorize the licensor to treat the licensee as an infringer. Yet, in this instance, the combination does not allow licensees to make a harrow unless they agree to this extraordinary provision.

2 Robinson on Patents, Sec. 821.

The fifteenth sub-division provides that the licensee shall not have the right to assign the license without the written consent of the licensor. It also provides that it shall not be assignable by operation of law. For instance, in case of the in-

solvency of one of the licensees, the receiver or assignee would take no rights under the license without the consent of the licensor. This clearly shows that the intent of the combination is to forever place the power in the National Harrow Company to do as it pleases in regard to the spring tooth harrow business of the United States, and that the ordinary rules of equity in insolvent cases shall not prevail in this instance.

Sub-division seventeen is as follows: "The "place of performance of the agreement shall be "the City of Utica, N. Y., and this agreement "shall be construed and the rights of the parties "thereunder determined according to the laws of "the State of New York." We do not controvert the proposition that, assuming the contracts to be valid, they shall be construed according to the laws of New York, but we contend that the laws of the State of New York applicable to the indisputable facts, in this case, show the contracts to be void, and therefore there are no contracts to construe.

But further the parties cannot take the contracts out from under the federal statute by agreeing to do so. This would be to nullify the statute.

All these provisions limiting the rights of the licensee are for the sole purpose of restricting the trade in harrows. It could make no difference how many harrows a manufacturer produced if he never sold them. If the statute is not far reaching enough to prohibit a combination to

prevent manufacturing of harrows the court will consider all their limitations as bearing upon the questions of restricting trade and commerce in such articles and as tending to a monopoly. All the restrictions with respect to manufacturing are totally ineffective except they be connected with the provisions in regard to sale, price and the territory where harrows are to be sold.

The Federal Courts have repeatedly passed upon this statute and the decisions, it seems to me, show clearly that the contracts before the Court in this case are in violation thereof.

McMullen v. Hoffman, 174 U. S. 639.

Central Transportation Company v. Pullman Car Company, 139 U. S. 24.

United States v. Trans-Missouri Freight Association, 166 U. S. 290.

United States v. Coal Dealers Association, 85 Fed. R. 252.

United States v. Hopkins, 82 Fed. R. 529.

United States v. Joint Stock Association, 171 U. S. 505.

Addyston Pipe and Steel Company v. United States, 175 U. S. 211.

The last case above cited seems to be very much in point here. In that case there were but six combining parties and the price of iron pipe was not fixed with reference to state lines, but with reference to specific territory. In this case there were nineteen combining parties. The object was to control the price of spring tooth harrows, and it was regulated with reference to state lines. In

the Addyston case an auditor was appointed to receive reports from the separate institutions in order to know whether they were complying with the agreement. In this case reports were to be made to the secretary of the National Harrow Company for the same purpose. It would seem that upon principal, the two cases are so near alike that good logic requires the court to hold these contracts illegal. The very principal upon which the federal statute rests is to keep trade and commerce free between the states. These contracts are for the sole purpose of restricting them. Prior to the making of them the plaintiff in error had free access to the markets of every state, but the contracts exclude it from the markets of the entire country unless it complies with the restrictions imposed upon it by the combination agreements.

It is not at all necessary that the monopoly should have been complete. The statute prohibits any contract which is in restraint of trade or commerce or which tends to monopolize trade and commerce or any part of it between the states. It would be fruitless to enter into a discussion as to the meaning of the word monopoly. In this day the air is virtually surcharged with it, and every intelligent person knows well its meaning. If any contract or combination has a tendency to prevent competition, control prices, limit production or curtail territory in interstate trade or commerce, it is an attempt at monopoly, and is prohibited by the statute.

The contention of the counsel for defendant in error that there may be a combination of patents has no application to this case. What matters it if a state court holds that the owners of patents may, at common law, combine to control an article covered by the patents? Such a decision would have no relevancy to this case for the federal statute is so broad that it includes "every contract combination in the form of a trust or otherwise," and declares them illegal. It would be impossible to draft a statute broader in this respect than the one under consideration. It is as complete a prohibition upon a combination of patents to control interstate commerce as to restrain trade in iron pipe or any other commodity. At common law contracts may be valid or invalid according as the court shall declare public policy concerning them, but in the Trans-Missouri Freight Association case, 166 U. S. 291-301 this court said: "If the law prohibits any contract or combination in restraint of trade or commerce a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject."

May not this Court look into the whole record to see if a party's rights under the Federal laws have been denied; and, if so, may not the Court consider any fact in the record necessary to enable it to grant relief?

In the case of Gregory v. McVeigh, 23 Wallace, 294, it was held that where a federal question

was involved in a suit in an inferior court, and no appeal could be taken to the highest court of the State, except by leave of such court or a judge thereof, and leave could not be obtained, a writ of error would lie to such inferior court to review its judgment in this court.

I understand from this case that where a federal question is involved no act of a state court will prevent the party coming into this court for redress. Applying this rule to the case at bar I ask, how can any decision of the Court of Appeals of New York prevent this court looking into the record to see whether or not rights have been denied to the plaintiff in error which are guaranteed to it by the constitution and statutes of the United States? The Court of Appeals has decided in effect that there is no appeal to that court from the judgment entered on the decision of the Appellate Division of the Supreme Court, except as to certain questions. Can this court be confined in its investigations of a case to such questions as the Court of Appeals decides it may consider? I think not. What if that court had decided that there was no appeal to it from the judgment entered on the decision of the Appellate Division? Would this court be prevented by such a holding from examining the whole record to ascertain whether or not a federal question was involved? In other words, can any state court by finding facts or failing to find them, prevent this court examining an entire record to see if the rights of a party under the federal laws have been denied? This court is not restricted

in its examination of a case by the constitution or Code of Civil Procedure of the State of New York, even if the Court of Appeals of that state is so restricted. In this case the Supreme Court of the State of New York has rendered judgment against the plaintiff in error. Its authority for so doing is the decision of the Court of Appeals, which court has authorized the rendition of such judgment upon the ground that it could not examine into the facts within the record. This court has sent its writ of error to the Supreme Court to return to this court the entire record, and it is before the court. It would seem therefore to be absurd to say that this court could not look into the record to any extent to ascertain whether or not a party's rights had been denied, if such rights are guaranteed by the constitution and the federal statutes. In the case of Watson v. Tarpley, 18 Howard, 517, the court said: "Whilst it will not be denied, that the laws of the several States are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot effect, either by enlargement or dimunition, the jurisdiction of the courts of the United States as vested and prescribed by the constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and constitution. This is a position which has been frequently affirmed by this court, and would

seem to compel the general assent upon its simple enunciation."

In the case of Amis v. Smith, 16th Peters, 313 the court said: "But when the effect of a state decision is only to regulate the practice of courts and to determine what shall be a judgment, and the legal effect of that or any other judgment, this court cannot consider themselves bound by such decisions, upon the ground that the laws upon which they are made are local in their character. It is the duty of this court, by their decisions, to preserve the supremacy of the laws of the United States, which they cannot do without disregading all state laws and state decisions which conflict with the laws of the United States."

If the Court does examine the entire record it will find that similar contracts to those put in evidence in this case, and found by the referee, were made by nineteen different harrow manufacturers; that the parties were located in different States; that they sold their products throughout the entire Union, and that the combination effectually monopolized the trade in this useful implement. It requires no argument, under such circumstances to show that the contracts are void under the federal statute for the same contracts have been repeatedly held void at common law, and I have shown above that they refer to interested commerce.

There are some cases in the federal courts in which the question of a party's right to institute equity proceedings under this statute has been passed upon. None of them have any application to the case at bar. The plaintiff in error in this case fights with a shield not with a sword. The statute declares "any contract" in restraint of inter-state commerce illegal. If the contract is void most certainly any court has jurisdiction to pass upon it provided one of the contracting parties seeks to enforce it in such court. This conclusion is too self-evident to require any discussion.

Still further, the defndant in error is in a very embarassing position if it seeks to raise this question, for it has expressly stipulated that this point was properly before the court. Sub-division 4 of the stipulation before referred to provides as follows:

"Whether or not the contract 'A' and 'B' are valid under the act of Congress approved July 2, 1890, Chapter 647 of the first session of the 51st Congress."

Rec. 390.

GENERAL REMARKS.

Monopolies originally were bestowed by kingly prerogative. Abuses were so great however under them that the people of England, through Parliament, declared them, with two exceptions, patent and copyright, to be injurious to the pub-

lic good, and provided severe penalties against those engaged in them. In modern times monopolies have grown to such proportions as to threaten serious consequences to the liberties of the people. It is said that they have no conscience, no care for the well being of the community, that their sole purpose is greed. From the World Almanac for 1900, that wonderful compendium of useful knowledge, it appears that the enormous amount of money invested in trusts and monopolies is more than five billion of dollars, a sum greater than the assessed valuation of all the Southern States, greater than the assessed valuation of the real and personal property of the largest five cities in the land. In view of these facts courts should weigh well the decisions which tend to foster and promote monopolies. The danger to this republic predicted by Lord McCauley, can be better averted by the courts than elsewhere, as before them the rich and the poor stand the same. But, monopolists do not always appear in person; they are, usually, behind the thin veil of a corporation; nor do the people always appear in proper person; they do appear however at all times, representatively in any party who opposes an adjudication which will deny to the public free access to the markets of the land. Such is the case at bar.

The man who tills the soil should be protected from combinations and monopolies, because it is not he alone who suffers from the oppressor. The entire community is dependent upon his suc-

cess in his occupation, and whatever effects him detrimentally effects the entire people. This particular monopoly puts its hand upon the tiller of the soil and compels him to pay exhorbitantly for one of the means, not only of gaining his livelihood, but of producing food for the people of the commonwealth. No spacious argument or fine spun theory can successfully assail the position of the plaintiff in error in this case. It has established that an illegal combination of manufacturers to control the production and sale of a necessary implement of husbandry to the detriment of the user and of the public at large. The court should pronounce such judgment as will uphold the rights of the plaintiff in error, and the public against a greedy monopoly.

FINALLY, The decision should be that the plaintiff in error is entitled to judgment that the contracts sued upon are in restraint of trade and commerce between the states and are void.

HENRY J. COOKINHAM,
Counsel for Plaintiff in Error.

Office Supreme Court U.S.
FILED
MAR 27 1902
JAMES H. McKENNEY,
Clerk.

No. 215.

Supreme Court of the United States.

No. 215, OCTOBER TERM 1901.

Reply Brf. of Cahill & Wood for P. E.

E. Bement & Sons,
Plaintiff in Error

Filed Mar. 27, 1902.

v.

National Harrow Co.
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR IN REPLY.

I.

The brief of counsel for defendant in error might lead one to believe that the contest in this case was over the facts, and the size of the record might give some color to that claim. The fact is, however, that there is not and never has been any controversy over the facts in this case so far as they relate to the questions which are before this court. The main facts upon which plaintiff in error relies to reverse the judgment were all put in evidence by the defendant in error, or were conceded by its counsel at the hearing. The question of fact that was controverted at the trial was as to what constituted a float spring-tooth harrow, and this record might better have been much shorter.

In reviewing the brief for defendant in error, we feel safe in saying that while it contains some things that are not in the record, and states inaccurately, sometimes, what the record shows, yet it contains ample admissions of fact to support the contentions of plaintiff in error, and to entitle it to a reversal of the judgment. Notwithstanding these admissions, there are some things in his brief to which we desire to reply.

It would seem from the brief of counsel for defendant in error that he has unique ideas of what are questions of fact and what are questions of law. When an appeal was taken in this case from the Supreme Court to the Appellate Division of that court, the counsel for the parties, to simplify the record, stipulated that certain questions and only those should be raised by the appellant on such appeal. Referring to this stipulation on pages 8 and 9 of his brief, counsel says that all such questions, except the 8th, referred to questions of fact.

Among the questions which counsel calls questions of fact are the following:

1. The validity of the contracts A and B attached to the complaint.

2. Whether or not the acts of the defendant in executing the contracts A and B were and are *ultra vires*.

4. Whether or not the contracts A and B are valid under the act of Congress approved July 2, 1890.

That counsel is serious in claiming these are questions of fact, and not of law, appears from page 54 of his brief. In speaking again of those questions which had been agreed upon as the questions involved in

the case he says: "All of those questions, except the 8th, were questions of fact, and not of law."

Counsel seems to believe, also, that the Court of Appeals regarded the conclusions of the referee upon the questions of law involved as findings of fact. He says at page 55 of his brief, "the Court of Appeals held and decided that under the statute and constitution of the state of New York, it was deprived of the power to consider any questions of fact, and that *the record showed no questions of law for review.*"

This is, however, going too far. We cannot bring ourselves to believe that the Court of Appeals did not know the difference between the findings of fact, and the conclusions of law. The decision of that court can be accounted for upon much more reasonable grounds. That court felt itself bound, absolutely, by the findings of the referee, as to the facts. The findings of fact by the referee were very brief, and somewhat obscure. His conclusions are so freely intermingled with his facts, that the counsel for the defendant in error has been grossly deceived.

We think the Court of Appeals in the hurry of business was mistaken as to the scope of the referee's findings of facts. The opinion seems to be based upon the idea that the referee found very little beyond the fact that license contracts A and B were executed for a valuable consideration, and reached the conclusion that such contracts, standing alone, did not import anything unlawful. We shall try to point out that the referee's findings went much further.

If the referee was a lawyer at all fit to hear a case of so much importance, he could not ignore the important fact that the Harrow Company's counsel, when he put in evidence the license contracts A and B, put in